United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,849

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

884

WRATHER CORPORATION,
and
WPIX, INC.,

Intervenors

On Appeal From a Memorandum Opinion and Order of the Federal Communications Commission

INDEX

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO,	)	
Appellant	)	
v.	)	Case No.
	)	18849
FEDERAL COMMUNICATIONS COMMISSION,	)	
Appellee	)	

NOTICE OF APPEAL AND STATEMENT OF REASONS THEREFOR

1. The National Association of Broadcast Employees and Technicians, AFL-CIO (NABET), hereby appeals from and requests this court to review and set aside an order released by the Federal Communications Commission on July 20, 1964 (FCC 64-656, 53250). The proceeding before the Commission in which the considered order was released was that of Wrather Corporation (ASSIGNOR) and WPIX, Inc.,(ASSIGNEE), File No. BASCA-138, BAPLH-51.

2. The Wrather Corporation (Wrather) is licensee of radio station WBFM in New York City. Involved in the proceeding were applications for Commission consent to assignment of the licenses of WBFM, as assignor, to WPIX, Inc. (WPIX), as assignee. At the time the complained of order was released the Commission had before it, among others: (a) a petition filed by NABET on February 18, 1964, requesting that the Commission deny the applications of Wrather and WPIX or, in the alternative, to designate the applications for hearing, permitting NABET to intervene as a party in interest: (b) a reply to oppositions to petition to

deny, filed by NABET on March 10, 1964; and, (c) a supplemental petition to deny, filed by NABET on May 19, 1964.

3. In paragraph 10 of its order the Commission found that NABET had demonstrated that it was a party in interest. In paragraph 14 of the same order, however, the Commission denied NABET's petition to deny the applications or to designate for hearing.

I. Jurisdictional Statement

4. This appeal is taken pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 402[b]), Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009) and Rule 37 of the rules of this court.

II. Standing of Appellant and Statement of the Nature of the Proceeding before the Commission

5. NABET is a labor organization and represents engineers, technicians and others employed in the broadcasting industry. Under certification of the National Labor Relations Board (NLRB), NABET has bargained collectively with Wrather as licensee of station WBFM concerning the wages, hours and working conditions of about six employees classified as operators and operator-engineers. There is now in force a collective bargaining agreement (expiration date, November 6, 1964) between NABET and WBFM. The agreement includes a union security clause and establishes vacation, severance pay, insurance and hospitalization plans.

6. During January, 1964, WBFM and WPIX filed their applications with the Commission. The proposed consideration, in total, was to be $400,000. WPIX indicated to the Commission in its application that it planned to purchase all of the assets of WBFM, including contracts and agreements existing at the date of consummation "to the extent that they are assignable," but the contract specifically provided, in addition, that WPIX was not required to employ, or otherwise incur liability to, any person formerly employed by WBFM. (This latter clause excepted from its coverage only contracts with advertisers and program production agreements.)

7. Upon learning that the applications had been filed, the New York Regional Representative for NABET on January 20, 1964, wrote the WPIX Executive Vice President explaining the existence of the collective bargaining agreement in force between NABET and WBFM, and inquired whether WPIX would likewise recognize NABET and accept the terms of the agreement. Toward the end of January the WPIX Vice President in charge of operations wrote in reply that the purchase agreement included only certain of WBFM's assets and not its personnel. The Vice President further stated that he did not anticipate that his company would have any use for the former WBFM employees.

8. These facts were all stated and reviewed by NABET in its two petitions and its reply to oppositions which were later filed with the Commission. At that point the Commission, in considering NABET's petition to deny the applications or, in the alternative, to set them for evidentiary hearing, had before it two basic questions: (1) whether the adverse effect (loss of their jobs and job rights) on WBFM employees represented by NABET was outweighed by other public interest considerations requiring that the transfer be approved as proposed; and, (2) whether WPIX in choosing to ignore the plight of the WBFM employees failed to display the requisite qualifications of a broadcast licensee to offer service in the public interest.

9. To paraphrase NABET's reply to oppositions and the Commission's memorandum opinion (par. 6), the NABET position in this regard is that if the jobs of the individuals now working for WBFM and represented by NABET are to be destroyed, some proof of a countervailing public interest consideration must be shown. And, second, in light of its conduct toward the WBFM employees the Commission should determine that the purchaser (WPIX) has shown a disposition to ignore the national labor policy of encouraging collective bargaining, a character fault which is to be judged in light of the public interest.

10. As noted, the Commission, although recognizing NABET as a party in interest, denied its petition to deny the applications. The mem-

orandum opinion and order was issued by a majority of five Commissioners over the dissent, without separate opinion, of Commissioners Ford and Cox. In its opinion the Commission spoke to the question of its jurisdiction and to the interpretation to be placed on the refusal by WPIX to become a party to the agreement with NABET. As to its jurisdiction the Commission said (par. 12):

> "The issue of the claim of continuing job rights by the six technical employees of WBFM, even after a station sale, is not a matter within this Commission's jurisdiction. We have long held that such claims must be brought in the appropriate forum, be it the civil courts or before the NLRB."

11. As to the position of WPIX, it was said (par. 13):

> "As to whether WPIX, Inc.'s position, in regard to becoming a party to or assuming the contract with NABET, violates or demonstrates a disposition to ignore national labor policy we think it does neither. * * * If it is later determined by appropriate authorities that WPIX, Inc.'s actions did constitute an unfair labor practice it would appear to be a conclusion reached from a reasonable difference in interpretation and not one reflecting on the character qualification of the assignee."

12. The immediate problem with the Commission's opinion is that it succeeds in completely skirting the basic question of whether it is in the public interest to permit the jobs and the job rights of the WBFM employees to be destroyed absent proven counterbalancing factors of the public interest which would be served by a grant. And, it is to be stated at the outset that no such counterbalancing factors have been advanced by the applicants, much less proven, except that Wrather has stated broadly that it desires to devote its time and capital elsewhere.

13. The Commission advances the possibility that while it does not view itself as "the appropriate forum," the NLRB may be. No mention is made, nor consideration given, of the point raised by NABET in

its supplemental petition to deny where it was emphasized that inherent in the nature of a transfer proceeding is the fact that a labor organization cannot file charges against a party which is not yet an employer and that in the circumstances of this case WPIX would not become the employer until the transfer is approved and consummated.

14. Again, simply stated, licensees are permitted to broadcast in service of the public interest, convenience and necessity as "trustees for the public" and in this devotion to the public interest they are regulated by the Commission. It might be thought that it would have gone without question that the Commission, as a part of the public interest consideration, would give attention to the impact of the proposed transaction on the employees affected. As it is, the Commission has chosen to ignore the impact on these workers without even an evidentiary hearing to determine what facts are available to be weighed in the balance between their job rights and the public interest. In fact, to our knowledge, the Federal Communications Commission is the only administrative agency authorized to consider and act upon transfer applications which has not held as a matter of course that the impact on the employees of the parties is an important element of the public interest. Surely, the destruction of jobs, in itself, cannot be thought of as in the public interest, absent counterbalancing proof that such a result would react in some other way to the greater benefit of the public interest than would continuation of the jobs and job rights.

15. That the referred to employees of WBFM would be aggrieved and adversely affected upon grant of the transfer applications is apparent. Their jobs would cease to exist upon transfer and no room would be made for them at WPIX. The gist of the matter, therefore, is that while WPIX is ready and willing to accept such advertising and program production agreements to its benefit as may be assignable, it is unwilling even to negotiate concerning the collective bargaining rights of the seller's employees. A transfer couched in such terms should not be permitted.

III. Basis for Appeal

16. It is the contention of the appellant that the actions, as stated, of the Federal Communications Commission in the indicated proceeding as set forth in the order of July 20, 1964, are arbitrary, capricious, contrary to law and in error because:

1. The Commission, without advancing countervailing public interest factors to justify its grant, found approval of the transfer applications to be in the public interest, although admitted facts established the adverse effect that would result on the jobs and job rights of the assignor's employees upon consummation.

2. The Commission found the assignee to be qualified when on the face of its application the assignee revealed its determination to ignore NABET's bargaining rights in contravention of the national labor policy.

3. The Commission failed to direct an evidentiary hearing to develop the as yet unrevealed public interest considerations which apparently, in the Commission's opinion, outweigh the adverse effect on assignor's employees.

17. NABET respectfully submits that an evidentiary hearing would reveal the public interest to lie in preservation of the jobs and job rights of the WBFM employees and in denial of the transfer applications in their present form.

18. WHEREFORE, appellant NABET respectfully requests this court to review the Commission order appealed herein, and the proceedings pursuant to which the order was entered, and, upon review, to hold such order unlawful and void and to reverse and remand the proceeding to the Commission with instructions to grant the NABET peti-

tion to deny the applications or, in the alternative, to designate the applications for formal hearing.

Respectfully submitted,

Warren Woods
Jerome Y. Sturm
Jon F. Hollengreen
Attorneys for Appellant

Of Counsel:

Wilson, Woods & Villalon
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1111 E Street, N. W.
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Sturm & Perl
150 Broadway
New York 38, N.Y.

Date: August 18, 1964
Due Date: August 19, 1964

Certificate of Service

PREHEARING STIPULATION

Appellant, National Association of Broadcast Employees and Technicians, AFL-CIO, Appellee Federal Communications Commission, and Intervenors Wrather Corporation and WPIX, Inc., do hereby stipulate and agree as follows:

1. The questions presented by this appeal are as follows:

   1. Whether the Commission acted erroneously in granting without hearing the application for assignment of the license of Station WBFM despite appellant's contention that the assignment would adversely affect the future job rights of the station's employees.

   2. Whether the Commission acted erroneously in determining without hearing, that WPIX, Inc., the proposed assignee of the WBFM licensee, was qualified

to be a licensee of the Commission not withstanding appellant's contentions that assignee has ignored appellant's bargaining rights and that such actions contravene national labor policy.

3. Whether the Commission acted erroneously in determining, without hearing, that a grant of the assignment application would be consistent with the public interest, convenience and necessity.

2. The Joint Appendix in the above captioned consolidated action shall be filed within ten (10) days after the filing of Appellant's Reply Briefs, or, if Appellant does not file any Reply Briefs, within twenty-five (25) days after the filing of Appellee's Brief.

3. Page references and citations in the Briefs of all parties shall be to the pages of the original record rather than to the pages of the Joint Appendix.

4. The Joint Appendix pages shall be consecutively numbered and in addition shall bear the appropriate original record page citation so that references in the Briefs to the original record pages can be readily ascertained in the Joint Appendix.

Respectfully submitted,

Warren Woods, Esq.
Attorney for Appellant

Daniel Ohlbaum, Esq.
Associate General Counsel of Appellee,

Aloysius B. McCabe, Esq.
Attorney for WPIX, Inc., Intervenor

John B. Jacob, Esq.
Attorney for Wrather Corporation, Intervenor

September 29, 1964

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: October 5, 1964

[4]

Received: January 15, 1964

EXHIBIT NO. A
Wrather Corporation

ASSIGNOR'S REASONS FOR SELLING

The Assignor desires to dispose of its interests in Station WBFM so that it can concentrate its energies on its other business endeavors. It is convinced that the proposed Assignee, based upon its past broadcast experience, is well qualified to operate the station in the public interest and in a manner that will serve the needs of the area.

FCC Form 314 — PART II (To be completed by ASSIGNEE) — Section I, Page 4

INSTRUCTIONS FOR PART II (Assignee)

A. The name of the assignee, stated in Section I hereof, shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other sections of the form, the name need be only sufficient for identification of the assignee.

B. This part of this application shall be personally signed by the assignee, if the assignee is an individual; by one of the partners, if the assignee is a partnership; by an officer, if the assignee is a corporation; by a member who is an officer, if the assignee is an unincorporated association; by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction, if the assignee is an eligible government entity; or by the assignee's attorney in case of the assignee's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the assignee, separately set forth the reason why the application is not signed by the assignee. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

C. Before filling out this application, the assignee should familiarize himself with the Communications Act of 1934 and the following parts of the Commission's Rules and Regulations: Part 1, Rules Relating to Practice and Procedure; Parts Relating to the Broadcast Services.

Name and post office address of assignee (See Instruction A for Part II)

WPIX, Inc.
220 East 42nd Street
New York 17, New York

Send notices and communications to the following-named person at the post office address indicated:

Leavitt J. Pope, Vice President

1. Give a full statement of assignee's reasons or purposes for requesting this assignment. As a licensee of television station WPIX, Assignee is familiar with needs and desires of residents of New York Metropolitan Area. Has for many years wished to operate an FM station to broadcast information and entertainment, as demonstrated by its 1946 application, denied after competitive hearing.

2. What is the name and address of the owner of the station (if other than the assignee)? Assignee will be owner of the station after assignment becomes effective.

a. Identify by date and names of parties any contracts entered into by assignor (including those for network service, use of mechanical records, sale of bulk time, etc., filed pursuant to Section 1.342) which will be performed by assignee. All contracts of Assignor may be cancelled not more than 13 weeks after effective date of assignment. Assignee does not expect to continue any beyond this date.

b. If any changes will be made in contracts assumed by assignee, describe fully. No contracts will be assumed beyond 13-week period.

3. Attach as Exhibit No. A a projected balance sheet showing assignee's financial condition after giving effect to the provisions involved in this application as of the same date of the balance sheet submitted in response to Section III, Para. 2, of this application.

4. a. Will assignee's control over the station, its property and equipment arise out of voluntary agreement with the assignor? If the answer is "Yes", attach three copies of the agreement as Exhibit No. , unless heretofore attached in answer to Par. 11a, Part I of Section I hereof. See Part I, par. 11 (a) — Yes [X] No [ ]

Any contract, lease or other voluntary agreement under which assignee claims control over the station must specifically show (1) assignee will have complete control over all necessary physical property and its use and unlimited supervision over the programs to be broadcast, (2) consideration, whether monetary or otherwise, and whether paid or promised, (3) all other terms and conditions involved in the assignment, including a statement that the instrument submitted covers the entire arrangement between the parties (if it does not, all other pertinent legal instruments must be submitted), (4) assignment is subject to consent of the Commission

b. Does assignee's control over the station, its property and equipment arise out of involuntary action? If the answer is "Yes", give as Exhibit No. a full narrative statement of the character and status of proceeding (i.e., administration of estate, bankruptcy, dissolution, etc., or operation of law in any other manner), showing all parties thereto, and attach copies of will, letters testamentary, letters of administration, or pleadings and court orders properly certified by the clerk of the court having jurisdiction over the matter. — Yes [ ] No [X]

The assignee waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests consent to the assignment of this license and/or construction permit in accordance with this application. (See Section 304 of the Communications Act of 1934)

The assignee represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application.

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Broadcast Application | FEDERAL COMMUNICATIONS COMMISSION | Section IV

STATEMENT OF PROGRAM SERVICE OF BROADCAST APPLICANT

Name of applicant: WPIX, Inc.

NOTICE TO ALL APPLICANTS

The replies to the following questions constitute a representation of programming policy upon which the Commission will rely in considering the application. It is not expected that licensee will or can adhere inflexibly in day-to-day operation to the representation here made. However, since such representation will constitute, in part, the basis upon which the Commission acts on the application, time and care should be devoted to the preparation of the replies so that they will reflect accurately applicant's responsible judgement of his proposed programming policy.

INSTRUCTIONS

1. Paragraphs 1 to 4 are divided into a left-hand column which pertains to past operation and a right-hand column which pertains to proposed operation. Applicants for new stations or assignees or transferees of existing stations are to fill in only the right-hand column while applicants for authorizations for renewal of existing station licenses are to fill in both columns.
2. Program data on past performance are to be based on the composite week for the year preceding the date of application except in the case of renewal applications where the year preceding the expiration date of the existing license is to be used. The days comprising the composite week of each year will be designated by public notice on or about November 15th of that year.
3. Program classifications incident to the replies to Paragraphs 2, 3, and 4 below, are to be in accordance with the definitions on Page 4 of this Section.
4. Assignees or transferees filing FCC Form 314 or 315 need not complete paragraphs 5 or 8.

PAST OPERATION	PROPOSED OPERATION (for a typical week)
1. (a) State actual minimum weekly schedule of operation under the present authorization, giving opening and closing time and total hours for weekdays and Sunday. DNA	(b) State minimum weekly schedule of operation proposed by licensee, permittee, assignee or transferee, giving opening and closing time and total hours for weekdays and Sunday. 24 hours daily, 7 days a week. Weekdays, 144 hours, Sundays, 24 hours.
2. (a) State for the composite week the percentage of time which was devoted to each of the following types of programs (totals to equal 100%). DNA	(b) State the percentage of time to be devoted to each of the following types of programs for a proposed typical week of operation under the authorization requested (totals to equal 100%). Attach program schedule for this proposed typical week and indicate thereon the class of each program in accordance with paragraph 4(b). See Exhibit C
(1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.) ..... %	(1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.) 87.3 %
(2) Religious (include here all sermons, religious news, music, and drama, etc.) ..... %	(2) Religious (include here all sermons, religious news, music, and drama, etc.) 1.9 %
(3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population) ..... %	(3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population) 0 %
(4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below) ..... %	(4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below) 0.2 %
(5) News (include here news reports and commentaries) ..... %	(5) News (include here news reports and commentaries) 7.5 %
(6) Discussion (include here forum, panel and round-table programs) ..... %	(6) Discussion (include here forum, panel and round-table programs) 1.1 %
(7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports) ..... %	(7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports) 2.0 %
(8) ..... %	(8) ..... %
(9) ..... %	(9) ..... %
(10) Miscellaneous ..... %	(10) Miscellaneous ..... %
100	100

Broadcast Application | STATEMENT OF PROGRAM SERVICE | Section IV, Page 2

3. (a) Dividing the broadcast week into 15 minute periods, specify below the number of 14½ minute periods within such 15 minute periods during the composite week in which were broadcast (exclusive of non-commercial spot announcements, call letter announcements and promotional announcements for sustaining programs): DNA

	No. of 14½ minute periods
(1) No spot announcements or commercial continuity	
(2) One spot announcement	
(3) Two spot announcements	
(4) Three spot announcements	
(5) Four spot announcements	
(6) Five or more spot announcements	
Total number of 14½ minute periods	

State the number of spot announcements (exclusive of non-commercial spot and call letter announcements, and promotional announcements for sustaining programs) broadcast during the composite week which exceeded one minute in length _____ (See definition of spot announcement)

(b) State what the practice of the station will be with respect to the number and length of spot announcements allowed in a given period. Applicant will conform to the time standards of the NAB Radio Code of Good Practices and thus not exceed 18 minutes of advertising in any hour. Announcements will be from 10 to 90 seconds in length and not more than three will be broadcast in a 14 1/2 minute period. However, it is expected that in normal practice not more than 12 minutes of advertising will be scheduled in any hour as a minimum of commercial interruptions is planned as a station policy.

4. In the tables below the percentages for each segment are to be computed on the basis of 100 percent of the operating hours within the particular segment for the seven days comprising the composite week (i.e., if full time operation, 70 hours for the 8 a.m. to 6 p.m. segment, 35 hours for the 6 p.m. to 11 p.m. segment, and the total weekly hours of operation between 11 p.m., and 8 a.m. for the third segment). The percentages in the column headed "Total" are to be computed on the basis of 100 percent of operating hours for the seven days.

The exact number of spot announcements should be stated, including those broadcast within participating programs, but excluding call letter announcements (call letters and location) and promotional announcements for sustaining programs.

NOTE: The purpose of the following tabulation is to enable the Commission to secure quantitative data as to the proportion of time (to be) devoted to the various classes of programs. The function of each class of program as part of a diversified program structure is discussed in the Commission's Report of March 7, 1946, entitled "Public Service Responsibility of Broadcast Licensees".

(a) State the percentage of time which was devoted to each of the following classes of programs during the composite week.

DNA

	PROGRAM LOG ANALYSIS (in percentages) 8 a.m.-6 p.m.	6 p.m.-11 p.m.	All other hours	Total
(1) Network commercial (NC)				
(2) Network sustaining (NS)				
(3) Recorded commercial (RC)				
(4) Recorded sustaining (RS)				
(5) Wire commercial (WC)				
(6) Wire sustaining (WS)				
(7) Live commercial (LC)				
(8) Live sustaining (LS)				
(9) Total commercial (1+3+5+7)				
(10) Total sustaining (2+4+6+8)				
(11) Complete Total	100%	100%	100%	100%
(12) Actual broadcast hours (per week)				
(13) No. of spot announcements (SA) (per week)				
(14) No. of non-commercial spot announcements (NCSA) (per week)				

(b) Show in the table below the percentage of time proposed to be devoted to each of the following classes of programs during a proposed typical week of operation.

	PROGRAM LOG ANALYSIS (in percentages) 8 a.m.-6 p.m.	6 p.m.-11 p.m.	All other hours	Total
(1) Network commercial (NC)	0	0	0	0
(2) Network sustaining (NS)	0	0	0	0
(3) Recorded commercial (RC)	76.5	87.8	61.6	73.2
(4) Recorded sustaining (RS)	0	0	33.3	12.5
(5) Wire commercial (WC)	0	0	0	0
(6) Wire sustaining (WS)	0	0	0	0
(7) Live commercial (LC)	17.5	10.2	4.4	11.1
(8) Live sustaining (LS)	6.0	2.0	0.7	3.2
(9) Total commercial (1+3+5+7)	94.0	98.0	66.0	84.3
(10) Total sustaining (2+4+6+8)	6.0	2.0	34.0	15.7
(11) Complete Total	100%	100%	100%	100%
(12) Proposed broadcast hours (per week)	70	35	63	168
(13) No. of spot announcements (SA) (per week)	700	350	630	1680
(14) No. of non-commercial spot announcements (NCSA) (per week)	140	70	126	336

Broadcast Application — STATEMENT OF PROGRAM SERVICE — Section IV, Page 3

5. (a) Attach as Exhibit No. DNA the original or one exact copy of the program log for the seven days comprising the composite week analyzed in the preceding paragraphs. (If original logs are submitted, they will be returned.)

(b) What year's composite week has been analyzed in the foregoing paragraphs? DNA

6. Will the proposed station be affiliated with any network? Yes ☐ No ☒
If the answer is "Yes", give the name of the network.

7. Attach as Exhibit No. a narrative statement on the policy to be pursued with respect to subject time available for the discussion of public issues, including illustrations of the types of programs to be broadcast and the methods of selection of subjects and participants. Applicant will make time available on a live sustaining basis for the discussion of timely subjects of local, national and international interest, with equal opportunity for the presentation of conflicting viewpoints. Applicant has regularly scheduled two discussion programs, each 55 minutes in length, and from time to time will pre-empt broadcasts for intermittent discussion programs. All 46 congressmen in New York Metropolitan Area will be offered time on "Congressional Report" and interesting and prominent personages will appear on "Local Issues".

8. If this application is for an FM authorization, will the programs of any AM station operating in the same area be duplicated? Yes ☐ No ☒
If the answer is yes,

(a) How many hours per day will be devoted to duplicated programs? None

(b) Call letters and location of the AM station
DNA

(c) What kinds of programs (musical, sports, etc.) will be duplicated?
DNA

9. State the average number of hours per week which will be used in advertising or promoting any business, or commercial activity other than broadcasting in which the applicant is engaged or financially interested either directly or indirectly. If this is an application for renewal of license, state this data for the past license period also. Advertising will be scheduled for N. Y. Daily News, owner of WPIX, Inc. to extent of approx. 3 hours per week.

10. If the data furnished in response to the questions in this Section IV do not in the applicant's opinion adequately reflect station operation, attach as Exhibit No. D a statement setting forth any additional program data that the applicant desires to call to the Commission's attention. If the applicant feels that the program material classified in paragraph 2 is susceptible of classifications other than those listed he may supplement paragraph 2 with an explanatory statement in this Exhibit.)

11. If this application is for a television authorization, will programs be broadcast in color? DNA Yes ☐ No ☐
If "Yes", will programs be: Network ☐ Local Live ☐ Local Slide ☐

12. State applicant's general plans for staffing the station, including the number of employees in each department (i.e. program, commercial, technical, etc.), and the names, residence and citizenship of the general manager, station manager, program director and other department heads who have been employed or whom the applicant expects to employ.

All executives and staff of WPIX will be responsible for the operation of the station, and approximately 8 additional persons will be hired for exclusive work on WBFM.

Executives are:
General Manager, Fred M. Thrower, New York, N.Y., U.S. Citizen;
Station Manager, Leavitt J. Pope, Scarsdale, N.Y., U.S. Citizen;
Chief Engineer, Otis Freeman, Huntington, L.I., N.Y., U.S. Citizen;
Controller, T. E. Mitchell, Hohokus, N.J., U.S. Citizen.

Staff:
Program Department - 5 people
Commercial Department - 4 people
Technical Department - 2 people
Administrative - 2 people

[21]

Exhibit C

RECEIVED: January 15, 1964

PROPOSED PROGRAM SCHEDULE

Monday through Friday:

Time	Name of Program	Type and Class of Program
6:00-6:50 A.M.	Morning Music	E, RC
6:50-6:55	Morning Prayer	R, LS
6:55-7:00	News	N, LC
7:00-7:25	Morning Music	E, RC
7:25-7:30	News	N, LC
7:30-7:55	Morning Music	E, RC
7:55-8:00	News	N, LC
8:00-8:25	Morning Music	E, RC
8:25-8:30	News	N, LC
8:30-8:55	Morning Music	E, RC
8:55-9:00	News	N, LC
9:00-9:55	Hi There	E, RC
9:55-10:00	News	N, LC
10:00-10:55	Hi There	E, RC
10:55-11:00	News	N, LC
11:00-11:55	Hi There	E, RC
11:55-12:00	News	N, LC
12:00-12:05 PM	Stock Market Report	N, LC
12:05-12:55	Music for Lunch	E, RC
12:55-1:00	News	N, LC

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1:00-1:55	Music for Lunch	E, RC
1:55-2:00	News	N, LC
1:00-2:55	Siesta	E, RC

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2:55-3:00	News	N, LC
3:00-3:05	Stock Market Report	N, LC
3:05-3:55	Siesta	E, RC
3:55-4:00	News	N, LC
4:00-4:25	Let's Dance	E, RC
4:25-4:30	High School Report	Ed, LS
4:30-4:55	Let's Dance	E, RC
4:55-5:00	News	N, LC
5:00-5:55	Cocktail Time	E, RC
5:55-6:00	News	N, LC
6:00-6:25	Cocktail Time	E, RC
6:25-6:30	Stock Market Report	N, LC
6:30-6:55	Cocktail Time	E, RC
6:55-7:00	News	N, LC
7:00-7:55	Music for the Dinner Hour	E, RC
7:55-8:00	News	N, LC

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8:00-8:55	Music for the Dinner Hour	E, RC
8:55-9:00	News	N, LC
9:00-9:55	Concert Hall	E, RC
9:55-10:00	News	N, LC
10:00-10:55	Concert Hall	E, RC
10:55-11:00	News	N, LC
11:00-11:05	Sports Time	T, LC
11:05-11:55	Concert Hall	E, RC
11:55-12:00	News	N, LC
12:00 Mid.-6:00AM	All Through the Night	E, 1/2 RC 1/2 RS

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Saturday:

Time	Name of Program	Type and Class of Program
6:00-6:55 AM	Morning Music	E, RC
6:55-7:00	News	N, LC
7:00-7:55	Morning Music	E, RC
7:55-8:00	News	N, LC
8:00-8:55	The Hebrew Hour	R, LS
8:55-9:00	News	N, LC
9:00-9:55	Current Favorites	E, RC
9:55-10:00	News	N, LC
10:00-10:55	Current Favorites	E, RC
10:55-11:00	News	N, LC
11:00-11:55	Current Favorites	E, RC
11:55-12:00 PM	News	N, LC
12:00-12:55	Music	E, RC
12:55-1:00	News	N, LC
1:00-1:55	Music	E, RC
1:55-2:00	News	N, LC
2:00-2:55	Siesta	E, RC
2:55-3:00	News	N, LC
3:00-3:55	Siesta	E, RC

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3:55-4:00	News	N, LC
4:00-4:55	Let's Dance	E, RC
4:55-5:00	News	N, LC
5:00-5:55	Cocktail Time	E, RC
5:55-6:00	News	N, LC
6:00-6:55	Cocktail Time	E, RC
6:55-7:00	News	N, LC
7:00-7:55	Music for the Dinner Hour	E, RC

7:55-8:00	News	N, LC
8:00-8:55	Dance Time	E, RC
8:55-9:00	News	N, LC
9:00-9:55	Dance Time	E, RC
9:55-10:00	News	N, LC
10:00-10:55	Dance Time	E, RC
10:55-11:00	News	N, LC
11:00-11:05	Sports Time	T, LC
11:05-11:55	Dance Time	E, RC
11:55-12:00	News	N, LC
12:00 Mid.-6:00AM	All Through the Night	E, 1/2 RS 1/2 RC

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Sunday:

Time	Name of Program	Type and Class of Program
6:00-6:55 AM	Music	E, RC
6:55-7:00	News	N, LC
7:00-7:55	Music	E, RC
7:55-8:00	News	N, LC
8:00-8:55	Catholic Hour	R, LS
8:55-9:00	News	N, LC
9:00-9:55	Protestant Hour	R, LS
9:55-10:00	News	N, LC
10:00-10:55	Show Time	E, RC
10:55-11:00	News	N, LC
11:00-11:55	Show Time	E, RC
11:55-12:00	News	N, LC
12:00-12:55 PM	Show Time	E, RC
12:55-1:00	News	N, LC
1:00-1:55	Congressional Report	D, LS
1:55-2:00	News	N, LC
2:00-2:55	Sports	T, LC

2:55-3:00	News	N, LC
3:00-3:55	Sports	T, LC
3:55-4:00	News	N, LC

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4:00-4:55	Sports	T, LC
4:55-5:00	News	N, LC
5:00-5:55	Cocktail Time	E, RC
5:55-6:00	News	N, LC
6:00-6:55	Cocktail Time	E, RC
6:55-7:00	News	N, LC
7:00-7:55	Local Issues	D, LS
7:55-8:00	News	N, LC
8:00-8:55	Concert of the Week	E, RC
8:55-9:00	News	N, LC
9:00-9:55	Concert of the Week	E, RC
9:55-10:00	News	N, LC
10:00-10:55	Concert of the Week	E, RC
10:55-11:00	News	N, LC
11:00-11:05	Sports Time	T, LC
11:05-11:55	Concert of the Week	E, RC
11:55-12:00	News	N, LC
12:00 Mid.-6:00AM	All Through the Night	E, 1/2 RS 1/2 RC

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Exhibit D

Rec'd. Jan. 15, 1964

Answer to Section IV, Par. 10

There are 42 FM and 36 AM stations licensed in the New York Metropolitan Area which WBFM serves, and as a result there is already a wide range of program services available to the listening audience. The FM industry is still seeking to achieve equal footing, both in audience popularity and commercial acceptance, with the AM radio stations. Considerable program experimentation will therefore probably be necessary. Applicant plant to undertake such experimentation so that the actual schedule may vary from that proposed at present. The applicant will advise the Commission of any substantial program changes should they occur.

In preparing the proposed schedule, a careful study a listener needs has been undertaken and a specific effort made to schedule news and other programming at times that they are not already available on other radio and FM stations in the New York Area. We also plan regularly to request suggestions by mail from listeners as to type and times of program services they would find desirable. As a part of our existing non-network television station operation, we already maintain a wide liaison with civic and governmental officials, religious, educational, business, sports, professional and public service groups, and other community leaders and will utilize such sources for the planned news, religious, discussion and talk programs incorporated in the proposed schedule.

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In view of the non-agricultural and urban nature of the New York Metropolitan Area, the applicant does not schedule on a regular basis agricultural programs on television station WPIX. Similarly, the applicant does not intend to program on a regular basis agricultural programs over WBFM.

Applicant wishes to call the Commission's attention to the fact that there are approximately nine non-commercial FM broadcast stations operating in the New York Metropolitan Area. Since these stations are operated by various educational and cultural organizations, their broadcasts are almost completely confined to educational material which substantially fulfills the needs of FM listeners for programs of an educational character. Nevertheless, the applicant has scheduled on a regular basis a program broadcast Monday through Friday entitled "High School Report".

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Rec'd: January 15, 1964

AGREEMENT made this 5 day of December 1963, between WPIX, Inc., a corporation organized under the laws of the State of New York (the Buyer), and Muzak, a division of Wrather Corporation, a corporation organized under the laws of the State of California (the Seller),

WITNESSETH:

WHEREAS, the Seller is the owner and licensee of FM broadcast station WBFM (including an auxiliary transmitter), 101.9 mc, effective radiated power of 9.5 KW, and a Subsidiary Communications Authorization using the subcarrier frequency of 67 KC (referred to herein as "the Station"), all operated pursuant to licenses or other authorizations issued by the Federal Communications Commission (referred to herein as "the Commission"); and

WHEREAS, the Seller and the Seller and the Buyer have negotiated for the sale and purchase of certain property, assets and rights of the Seller as described below; and

WHEREAS, the Seller and the Buyer have entered into this Agreement subject to the grant by the Commission of its consent and approval to (a) the terms and conditions hereof and (b) to the operation by the Buyer of the Station following the consummation of the transactions contemplated by this Agreement and subject to the availability, under

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the appropriate authorization of the Commission, of the initial sub-carrier FM Multiplex facilities of the Station immediately following the consummation of the said transaction, exclusively for the transmission of Muzak music and musical programs to customers and subscribers of the Muzak background music service, as provided in a certain written agreement between the Buyer and the Seller bearing even date (hereinafter called "the Multiplex Agreement"),

NOW, THEREFORE, the parties hereby mutually agree as follows :

Assets To Be Sold

1. A. Subject to the provisions of paragraph 14 hereof and subject to the grant by the Commission of its consent and approval and on the terms and conditions herein set forth, the Seller, on the Date of Sale (as defined in paragraph 4), shall sell, assign, transfer, and convey to the Buyer, and the Buyer shall purchase and acquire from Seller, all assets now used by the Seller in the operation of the Station, including:

(a) the physical equipment described in Exhibit A attached hereto;

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(b) the record library of the Station;

(c) all licenses, permits or other authorizations for or used in connection with the operation of the Station (to the extent that such licenses, permits or other authorizations are transferable);

(d) such files, records and logs relating to the business and operation of Station (as are in the possession of the Seller) and which the Buyer may reasonably require;

(e) to the extent that they are assignable, contracts and agreements existing at the Date of Sale for the sale of Station broadcast time, to the extent that they are described in the Exhibit B, attached hereto, (plus such additional contracts and agreements as may have been entered into between the date of the preparation of Exhibit B and the date of the execution of this Agreement) and to the extent

that any additional contracts and agreements for the sale of Station broadcast time are consented to in writing by the Buyer;

(f) to the extent that they are assignable, the program production agreements described in Exhibit C attached hereto. Seller will not enter into any additional production agreement for cycles of more than thirteen (13) weeks subject to termination at the end of any such cycle on four (4) weeks' prior notice.

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B. Subject to the provisions of paragraph 14 hereof and subject to the grant by the Commission of its consent and approval and on the terms and conditions herein set forth, the Seller, on the Date of Sale, shall sublet to the Buyer and the Buyer shall sublease from the Seller upon the same terms and conditions as are contained in the lease agreement dated April 21, 1959 between Ten East Fortieth St. Co., Landlord, and Muzak Corporation, Tenant, the space now occupied by the Seller on the forty-eighth floor of the building at 10 East 40th Street, New York, N.Y. (not including any of the space heretofore subleased by the Seller to WBAI-FM, Inc. by agreement of sublease dated September 14, 1960, as amended, but including the right to maintain an antenna and supporting structure, together with necessary auxiliary equipment on the roof of said building). By the terms of such sublease, the Seller shall give to the Buyer whatever rights the Seller now has to remain in the premises and the amount of rent to be paid shall be the amount reserved under the terms of the aforesaid lease, dated April 21, 1959, as amended, less any amounts paid by WBAI-FM, Inc. under the terms of its aforesaid sublease dated September 14, 1960, as amended.

C. Except as hereinafter provided in paragraph 2 (b), nothing in this Agreement shall be deemed to require the Buyer to employ or otherwise incur liability to any person employed by the Seller, whether in the operations of the Station or otherwise.

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Exclusions, Assumptions, Etc.

2. (a) The sale does not include any of the cash on hand or in banks, or any accounts or notes receivable, of the Seller, whether or not arising from the operations of the Station.

(b) The Buyer agrees to assume all of the liabilities, obligations, and responsibilities of the Seller under the agreements described in subparagraphs A (e) and (f) of paragraph 1 hereof to the extent that the same arise on or after the Date of Sale.

Purchase Price

3. The purchase price is Four Hundred Thousand Dollars ($400,000.00) payable by the Buyer to the Seller as follows: Ten Thousand Dollars ($10,000.00) upon the execution of this Agreement, receipt of check for which is hereby acknowledged, and the balance of Three Hundred Ninety Thousand Dollars ($390,000.00) by certified or bank cashier's check to be delivered to the Seller at the closing on the Date of Sale.

In addition to such purchase price, the Buyer will pay all New York City sales tax obligations imposed with respect to this sale and will indemnify and hold the Seller harmless from any and all claims, assessments, loss or damage in connection therewith.

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Rec'd: February 20, 1964

PETITION OF NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO, TO DENY APPLICATION OR, IN THE ALTERNATIVE, TO DESIGNATE FOR FORMAL HEARING

Comes now National Association of Broadcast Employees and Technicians, AFL-CIO (herein referred to as NABET), and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, and Section 1.580(i) of the Commission's Rules and Regulations, respectfully petitions the Commission to deny the above-entitled applications or in

the alternative to designate the applications for formal hearing and to grant leave to petitioner to intervene at hearing as a party in interest, for the following reasons, to wit:

1. Petitioner is a labor organization representing engineers, technicians and other employees in the broadcasting industry. Pursuant to certification by the National Labor Relations Board it has engaged in collective bargaining since November, 1961 with Wrather Corporation, licensee of radio station WBFM in New York City (herein WBFM), to establish the wages, hours and working conditions of employees of the station in an appropriate unit for purposes of collective bargaining of approximately six employees classified as operators and operator-

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engineers. There is now in effect a collective bargaining agreement between NABET and WBFM which will expire on November 6, 1964. In addition to the usual provisions governing wages, hours and working conditions, the agreement includes a union security clause and establishes a vacation and severance pay plan and an insurance and hospitalization plan. All six employees in the bargaining unit are members of NABET. *

2. On or about January 15, 1964 WBFM and WPIX filed applications for Commission consent to the transfer of the licenses of WBFM as assignor to WPIX, Inc. as assignee, for a total consideration of $400,000. Of this amount $10,000 has already been paid. The underlying contract provides that buyer is to purchase "all assets" including physical equipment, record library, all licenses, files and records, contracts and agreements existing at date of sale "to the extent that they are assignable," and program production agreements to the extent they are assignable. The contract also provides that except as provided in paragraph 2(b) the agreement will not require the buyer to employ or otherwise incur any liability to any person employed by seller. Paragraph 2(b)

refers only to contracts with advertisers and program production agreements. The transfer applications were accepted for filing on January 21, 1964.

3. Promptly after being informed that an application for Commission consent to transfer of licenses had been filed, Eleanor Belack, Regional Representative for NABET in New York City, wrote a letter, dated January 20, 1964, to the Executive Vice President of WPIX, Inc.

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* All statements of fact contained herein are based on the affidavit of Eleanor Belack, regional representative of NABET in New York City, and the correspondence attached to her affidavit or on the official records of the Commission.

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notifying him of the current collective bargaining agreement between WBFM and NABET asking him whether WPIX, Inc. would continue to recognize NABET as the bargaining representative by accepting the "terms and conditions of the existing Agreement" and "becoming a party thereto." By letter of January 31, 1964 the Vice President in Charge of Operations of WPIX, Inc. replied to the January 20 letter that the purchase of WBFM included only certain assets and that personnel and contracts were not included in the understanding. He added that although final plans had not been made as yet, the company did not expect it would need additional technical personnel because it already had a substantial staff in connection with the television station. The letter, of course, overlooked the fact that the contract to purchase does include advertising contracts "to the extent that they are assignable."

I. Petitioner is a party in interest.

4. It is now well-established that a labor union has standing as a party in interest within the meaning of Section 1.580(i) of the Rules and Regulations upon a proper showing that collective bargaining rights or

other rights of employees which it represents are threatened by a proposed transfer. See Rockford Broadcasters, Inc., 1 RR 2d 405 and cases cited therein at 1 RR 2d 412. Indeed, there is persuasive authority for the proposition that a labor organization has standing as a party in interest in any FCC proceeding which may result in economic injury to its members. See International Union of Electrical, Radio & Machine Workers, AFL-CIO, et al. v. United States and the Atomic Energy Commission, 280 F. 2d 645 (C.C. D.C. 1960); American Communications Commission v. United States, 298 F. 2d 649 (C.C.A. 2, 1962); NAACP v. Alabama, 357 U.S. 449 (1957). In the present case the assignee, WPIX, Inc. proposes to extinguish the bargaining rights of NABET by ignoring

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its collective bargaining agreement, terminating the employment of its members and refusing to recognize its bargaining rights.

II. A grant of the application would be prima facie inconsistent with the public interest, convenience and necessity.

5. The statute permits the Commission to grant a transfer application without hearing only if it can find that on the pleadings and representations made to it there are no substantial and material questions of fact and the grant will meet the public interest standard. If a substantial and material question of fact exists, or if the pleadings and representations do not make clear that the grant would meet the public interest standard, then the Commission is required to designate the application for hearing. 47 USC Sec. 309(d)(e).

6. In the present case the substantial and material facts appear to be admitted. NABET has been certified by the National Labor Relations Board as the collective bargaining representative of the operators and operator-engineers employed at WBFM. The present licensee and proposed seller, WBFM, has bargained with NABET and has entered into

an agreement covering the terms and conditions of employment of employees within the certified bargaining unit which does not expire until November 6, 1964. NABET has requested the buyer, WPIX, Inc., to honor its bargaining agreement for the remainder of its term and hence to recognize its status as the bargaining representative. The buyer has replied that it does not plan to hire any of the employees who will be displaced by approval of the transfer and will not acknowledge the contract.

7. We submit these uncontroverted facts raise two material issues involving the public interest standard. The first is whether the effect of a proposed transaction which is subject to Commission approval under the statute upon employees involved is one element of the public interest,

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convenience and necessity which the Commission must consider irrespective of the larger and somewhat different question of whether the refusal of the buyer to acknowledge NABET's bargaining rights contravenes national labor policies. In essence the question is whether a contract which on its face and by admission of the parties causes economic injury to the contractual rights and employment of skilled television personnel is prima facie inconsistent with the public interest unless the parties to the transaction advance some countervailing considerations of the public interest which grant of the application would serve. In short, the destruction of jobs cannot of itself be in the public interest unless some resulting improvement in service to the public flowing from the proposed transaction should outweigh the public interest in the loss of jobs. In the application itself and the accompanying exhibits neither the buyer nor the seller advances any such countervailing considerations for evaluation by the Commission other than the seller's unadorned and casual statement that it desires to sell so that it can concentrate its energies on its other business endeavors.

8. Certainly the idea that the effect upon employees of a financial transaction subject to regulatory approval is one element among the complex criteria by which the public interest is evaluated and balanced, is not a novel one in American administrative law. Indeed, so far as our research has been able to discover, the Federal Communications Commission is the only federal administrative agency with statutory authority to approve transfer of governmentally bestowed operating rights which has not consistently held that the impact of such transactions on the employees involved is an important element of the public interest. For example, the Interstate Commerce Commission which is governed by a similar public interest standard, long before its statute was amended to require it to give weight to a consideration of "the interest of the carrier employees affected" (49 USC Sec. 5(c) [1940]),

approved transfers of operating rights between carriers only upon detailed conditions to protect the seniority, tenure, pensions and other contract rights of employees. See St. Paul Bridge & Terminal Railway Co. - Control, 199 I.C.C. 588. The Civil Aeronautics Board reached the same conclusion under a similar statute in United-Western Acquisition of Air Carrier Property, 11 C.A.B. 701, at 707, when it said:

> "Any doubts as to whether the general authority under sections 401(i) and 408(b) to attach conditions to an order of approval issued thereunder includes the power to impose conditions for the benefit of adversely affected employees are set at rest by three decisions of the Supreme Court. United States v. Lowden, 308 U.S. 225; ICC v. Railway Labor Assn., 315 U.S. 373 (1942); Railway Labor Association v. U.S., 339 U.S. 142 (1950). For present purposes the net of these decisions is that although the Board need not impose conditions for the benefit of adversely affected employees in cases involving route transfers, acquisitions, and mergers, it may do so in its discretion."

9. Indeed, the Federal Communications Commission has itself held in a transfer case that the proposed retention of personnel of the selling station was an affirmative factor supporting a grant of the application as in the public interest. See the Seitz case, 7 F.C.C. 315, 318 (1939) where the Commission stressed that "The present manager, radio operators, and technicians now employed at the station will be retained on a regular basis." The basic criteria for judgment and preference in comparative cases have always included such factors as "carefulness of operational planning for television" and "staffing." See letter from Chairman of Commission August 30, 1956 to Chairman of Senate Interstate and Foreign Commerce Committee, U.S. Senate, Hearings on S. Res. 13 and 163, 84 Cong., 2d Session (1956) pp. 979-981. If carefulness of operational planning and staffing are important factors in comparative cases, they should be considered at least equally important

in Section 310(b) cases where the statutory standard for approval is identical; i.e., whether a grant of the application will serve "the public interest, convenience and necessity."

10. In short, the adverse effect of the proposed transaction is not solely a private effect; it is a private effect inextricably intertwined with the public interest. A trustee of the public's air waves should either be able to show in its application or at hearing that there will be no adverse effect on employees or that despite the existence of an adverse effect, other factors will permit the assignee to better serve the public interest than before.

11. There remains the second and larger question, however, of whether the refusal of the buyer to acknowledge NABET's bargaining rights contravenes national labor policy and thus is prima facie inconsistent with the public interest standard. On this question NABET relies entirely on the cases cited and the reasoning used by Commissioner Loevinger in his dissent in Rockford Broadcasters, Inc., 1 RR 2d

405. The buyer here not only expresses no doubt about the majority status of NABET; he straightforwardly states that he has no intention of recognizing the NABET contract or of employing the NABET members because he has sufficient personnel of his own to handle the new operation. The buyer is willing to negotiate for and accept such advertising contracts as may be assignable, but he is resolutely unwilling even to negotiate on the question of the collective bargaining rights of the seller's employees.

CONCLUSION

Petitioner respectfully submits that the specific allegations of fact in this petition are sufficient to show that the petitioner is a party in

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interest and that a grant of the application would be prima facie inconsistent with the public interest. The applications should be designated for evidentiary hearing on the following issues:

1. Whether the grant of the subject applications will adversely affect the employees of WBFM and, if so, whether such adverse effect is outweighed by other factors which will enable WPIX, Inc. to better serve the public interest, and

2. Whether WPIX, Inc. as an applicant for consent to the voluntary assignment of license has the requisite qualifications to serve the public interest as a broadcast licensee in the light of its conduct with respect to the bargaining rights of NABET and the employees represented by NABET and the national labor policy.

Respectfully submitted,

Warren Woods
Jerome Y. Sturm
Jon F. Hollengreen

Attorneys for National Association of Broadcast Employees & Technicians, AFL-CIO

Certificate of Service

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AFFIDAVIT OF ELEANOR BELACK

Eleanor Belack of 48 West 48th Street, New York 36, New York, on oath deposes and says:

1. I am regional representative for the National Association of Broadcast Employees and Technicians, AFL-CIO, in New York City and among my duties are the negotiation of collective bargaining agreements with broadcast stations in the New York City metropolitan area.

2. NABET has had a collective bargaining relationship with Radio Station WBFM since November, 1961. The basic agreement with the Employer became effective November 7, 1961 for a two year term expiring November 6, 1963. A supplemental agreement executed December 23, 1963 extended the November 7, 1961 agreement until November 6, 1964 after making a few changes in certain provisions of the contract, including wages. The agreement and supplemental agreement set forth standard provisions governing wages, hours and working conditions and include a union security clause, a vacation and severance pay plan and an insurance and hospitalization plan. The station presently employs two operator-engineers and four operators within the bargaining unit represented by NABET and all six of these employees are members of the union in accordance with the union security provision of the contract. In my capacity as regional representative for NABET I negotiated the supplemental agreement of December, 1963.

3. In mid-January, 1964, I was advised that WPIX, Inc. and WBFM had filed with the Commission an application for consent to the transfer of the license of WBFM to WPIX, Inc. for a total consideration of $400,000. Promptly on January 20, 1964 I wrote a letter to Fred Thrower, Executive Vice President of WPIX, Inc. notifying him of our current agreement with WBFM and asking him to advise the union "as to whether or not you will accept the terms and conditions of the exist-

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ing Agreement by becoming a party thereto." A copy of this letter is attached to this affidavit.

4. Under date of January 31, 1964 the Vice President in Charge of Operations of WPIX, Inc., one L. J. Pope, replied to my letter of January 20, 1964. In his letter Mr. Pope said that the purchase of WBFM included only certain assets and that personnel and contracts were not included in the understanding. He added that although final plans had not been made as yet, the company did not expect it would need additional technical personnel because it already had a substantial staff in connection with the television station. A copy of this letter is attached to this affidavit.

/s/ Eleanor Belack

[Jurat dated February 12, 1964]

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January 20, 1964

Mr. Fred Thrower, Executive Vice President
WPIX-TV
220 East 42nd Street
New York, N.Y.

Dear Mr. Thrower:

As you know, NABET represents the Operators and Operators-Engineers employed by WBFM at 229 Park Avenue South. The current Agreement was entered into in January 1964 for the period November 7, 1963 through November 6, 1964.

We have been informed that your Company has purchased WBFM and that you will continue to operate this Station.

In view of the existing Agreement, will you please advise us as to whether or not you will accept the terms and conditions of the existing Agreement by becoming a party thereto.

You, of course, recognize that your decision in this matter is of great

importance to the employees covered by this Agreement and to the Union. And we must therefore request an immediate response setting forth your position.

Very truly yours,

/s/ Eleanor Belack

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TELEVISION WPIX CHANNEL 11

January 31, 1964

Miss Eleanor Belack
Regional Representative
National Association of Broadcast
Engineers and Technicians
Room 406
48 West 48th Street
New York, New York

Dear Miss Belack:

This is in reply to your letter of January 20th which has been referred to me.

Our projected purchase of WBFM includes only certain assets. Personnel and contracts are not included in the understanding.

Although we have not made final plans as yet, it is our expectation that we will not have need for additional technical personnel inasmuch as we already have a substantial staff in connection with our television station. We may wish to consider the qualifications of some of the present WBFM employees if we find a need when our plans are further along.

Sincerely,

/s/ L. J. Pope

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Received: March 4, 1964

OPPOSITION TO "PETITION OF NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO, TO DENY APPLICATIONS OR, IN THE ALTERNATIVE, TO DESIGNATE FOR FORMAL HEARING"

Wrather Corporation, licensee of FM Broadcast Station WBFM, New York, New York, by its attorneys, hereby opposes the Petition of the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET) to deny. In support thereof, the following is shown:

Preliminary Statement

1. NABET is a labor organization, and according to its petition, has engaged in collective bargaining with WBFM and an agreement between the two organizations is extant. All six employees in the bargaining unit are members of NABET. NABET points out that the instant application involves a transfer of assignable assets and that the contract of sale does not require the buyer to employ or otherwise incur any liability to any person employed by seller. NABET points out that an official of WPIX, Inc. (the Assignee) advised the regional representative of MABET, by a letter dated January 31, 1964, in pertinent part as follows:

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> "Our projected purchase of WBFM includes only certain assets. Personnel and contracts are not included in the understanding.
>
> Although we have not made final plans as yet, it is our expectation that we will not have need for additional technical personnel inasmuch as we already have a substantial staff in connection with our television station.
>
> We may wish to consider the qualifications of some of the present WBFM employees if we find a need when our plans are further along."

NABET alleges that it is a party in interest and that grant of the application would be "prima facie" inconsistent with the public interest.

According to NABET, two material issues are involved. The first is whether the effect of the proposed transaction, which is subject to Commission approval, upon employees involved is one element of the public interest. The second question is whether a refusal of the buyer to acknowledge NABET's bargaining rights would contravene national labor policies. We submit that these questions are not before the Commission at all and that the Petition, which raises no material question affecting the public interest, should be denied.

Standing

2. We agree that NABET has alleged facts sufficient to give it standing as a party in interest under Section 309(d) of the Communications Act. A proper showing by a labor union that collective bargaining rights or pension rights of employees which it represents are directly affected by a proposed transfer is sufficient to establish a right as a party in interest. Transcontinent Television Corporation, 21 Pike and Fischer RR 945 (1961).

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The Petition To Deny Must be Dismissed and The Subject Application Granted

3. NABET has requested the Commission to set the instant application for hearing on the following issues:

> 1. "Whether the grant of the subject applications will adversely affect the employees of WBFM and, if so, whether such adverse effect is outweighed by other factors which will enable WPIX, Inc. to better serve the public interest, and
>
> 2. Whether WPIX, Inc. as an applicant for consent to the voluntary assignment of license has the requisite qualifications to serve the public interest as a broadcast licensee in the light of its conduct with respect to the bargaining rights of NABET and the employees represented by NABET and the national labor policy."

Based upon the Petition To Deny before the Commission, the sole rea-

son for requesting an evidentiary hearing is the exchange of two letters. Careful examination of those documents, which are attached to the Petition To Deny, reveals that a hearing would serve no useful purpose and that the application should be granted.

4. While NABET has met the first test under the Act to give it standing as a party in interest, it has not made the necessary showing that a grant of the subject application would be prima facie inconsistent with the public interest, convenience and necessity. Moreover, no substantial or material question of fact has been raised to warrant the relief requested.

5. The law is well settled. There is a marked similarity between this and Transcontinent Television Corporation, 21 Pike and Fisher RR 945 (1961). There, the Commission had this to say, in part (supra, p. 956):

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". . .The question presented by the subject petitions resolves itself into one of a controversy over private rights. Although petitioners have alleged that a grant of the subject application will result in abrogation of its union contract because the assignee has not assumed such contract, these factors, while sufficient under the circumstances to establish petitioners' standing to be heard, fall far short of facts tending to show that a grant of the application would prima facie not be in the public interest. As we stated in the Huntington Radio case, supra:

> 'While the showing as to standing may be based on economic injury, electrical interference or other private effects, the showing with respect to the Commission's action . . . must relate to the public interest.'

Furthermore, the Commission is not the appropriate forum for the adjudication of rights in a private controversy. The Commission has neither the authority

nor the machinery to adjudicate alleged claims arising out of private contractual agreements between parties. As we have repeatedly stated, the local civil court is the appropriate forum for such matters. See A.A. Schmidt, 14 Pike and Fischer RR 1156, and Stanmark, Inc., 18 Pike and Fischer RR 1002a. Moreover, it appears that no claim is made in the petitions that the subject application was not filed in good faith, or that questions are raised with respect to the qualifications of the parties. As to the latter point, petitioners do allege generally that by the record presented to the Commission (VETERANS) reveals its unfitness to be a trustee of a broadcasting license." However, not one fact is offered by petitioners as evidence of this charge. A Petitioner must do something more than set forth 'vague, nonspecific, conclusionary arguments and allegations; he must allege those facts upon which his conclusions as to the impropriety of a Commission grant without hearing are predicated.' See Van Curler Broadcasting Corporation, 11 Pike and Fischer RR 215; Salinas Broadcasting Corporation et al, 9 Pike and Fischer RR 595; and T.E. Allen & Sons, Inc., 9 Pike and Fischer RR 590h".

6. The case is interesting from another aspect. NABET argued in the above case that as a matter of contract law, the Assignor was required to assign its labor contract with NABET to the Assignee and that the Assignee was bound by its terms because they contained recitals which referred to "successors and Assigns". The Assignee argued that

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such a contention was contrary to well established contract law in New York where it was recently held reference "to successors and assigns" of the employer in the preamble or recitals of a labor contract forms no part of the contract itself. A footnote in the Commission's Opinion following this statement reads as follows (21 Pike and Fischer at 951):

"(The Assignee states) further that therefore such a clause does not impose any obligation on the employer that he require the purchaser to assume the labor contract, and, absent an express assignment and assumption thereof, does not bind the purchaser to perform under the labor contract. Citing, Application of George Rattray & Company, 209 N.Y.S. 2d 869, 875-76 (Sup. Ct., Nov. 18, 1960)".

The Commission in the Transcontinent Television Corporation case found it unnecessary to rule upon this point, and we submit that it is unnecessary for the Commission to reach it here. [1]

7. NABET places great reliance upon the dissent in Rockford Broadcasters, Inc., (1 Pike and Fischer RR 2d 405, 417 et seq (1963)).[2] The first headnote in Pike & Fischer on the case reads as follows:

"(53:24) Relevancy of refusal to bargain with labor Union prior to assignment of station license.

Application for approval of voluntary assignment of station license will not be set for hearing on basis of allegations that the assignee has refused to discuss with the union representing employees of the station, prior to consummation of the sale, its plans as to staffing of the station and employment relations or to make commitments inhibiting the freedom of its discretion to make changes in those areas. Assignee had not acted in an arbitrary or reprehensible manner but had stated that it intended to recognize and would negotiate with bargaining representatives whom station employees might designate after the sale. It could not be found that the assignee's conduct portended a policy toward station employees contrary to public policy as reflected in the National Labor Relations Act. Rockford B/casters, Inc., 1 RR 2d 405 (1963)."

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1 In any event, there is no allegation that the WBFM Union contract makes reference "to successors and assigns."

2 On February 28, 1964, the Commission denied a Petition for reconsideration filed by NABET (Commissioner Barley abstained from voting and Commissioner Loevinger was absent.)

8. The Commission's reasoning in Rockford may be found in Para. 21 of the Memorandum Opinion and Order.[1] There, the Commission pointed out that the assignee had represented that it intended to recognize and negotiate with such bargaining representatives as the station employees might, after the sale, designate either through formal procedures prescribed by the National Relations Board or by more informal methods clearly reflecting the employees' desires as to representation. There was no basis for the NABET contention that assignee's conduct portended a policy toward station employees contrary to public policy on collective bargaining as reflected in the letter and intent in the National Labor Relations Act.[2] Although the assignee had refused to make commitments inhibiting the freedom of its discretion to make changes in the station staff and in the terms and conditions of employment, the Commission found no support for NABET's contentions. The application was granted. Our case is quite different from Rockford for two reasons:

(1) Rockford was union vis a vis non-union; and
(2) The only facts in support of the NABET charges here are two letters.

9. The basis for Commissioner Loevinger's dissent (1 Pike and Fischer RR 2d 417) was the fact that he felt the Commission should be concerned only to see that there is willing compliance with the national labor policies which favor the establishment of employment terms by collective bargaining between the duly designated representatives of employees and the employers. For him the pleadings and the repre-

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[1] 1 Pike and Fischer RR 405, 413 (1963).

[2] The Commission reasoned that in any case where such a policy was found to exist, ". . . the Commission would be called upon to consider whether the facts would preclude the public interest finding which, under the Communications Act, is pre-requisite to the grant of a broadcast license to a would-be assignee."

sentations made were "plainly inadequate" to show an inclination by the assignee to comply with its collective bargaining obligations (1 Pike and Fischer RR 2d 421).

10. Under any test, the reasoning of Transcontinent Television Corporation, the position of the majority in Rockford, or the dissent in Rockford, this petition must fail. Clearly, the assignee's answer to the regional representative does not make grant of this application prima facie inconsistent with the public interest.

The Facts Are Undisputed and do not Portend a Policy on the Part of Assignee Contrary to the Public Interest

11. There is absolutely no indication from the pleadings filed by NABET of any inclination on the part of the assignee not to comply with its collective bargaining obligations prescribed by the law. In fact, it is our understanding that the assignee already has collective bargaining agreements with several unions.[1] The official of the assignee in his letter, the letter which is the bone of contention, merely states that the purchase of WBFM included only certain assets and that the personnel and contracts were not included in the understanding. He added that although final plans had not been made as yet, the company did not expect it would need additional technical personnel in light of its present substantial staff. The final paragraph of the letter reads:

> "We may wish to consider the qualifications of some of the present WBFM employees if we find the need when our plans are further along."

Can it be seriously contended that this letter makes grant of the instant application contrary to the public interest? Does this letter

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1 The assignor, in New York alone, has collective bargaining agreements with three different unions.

necessitate an evidentiary hearing? Has any violation of the National Labor Relations Act been shown? Does this one letter, by any stretch of the imagination, make grant of the application contrary to the public interest? We submit not. The petition should be denied and the application granted forthwith.[1]

Respectfully submitted,

WRATHER CORPORATION
By /s/ Thomas H. Wall
By /s/ John B. Jacob
Attorneys for Wrather Corporation

March 4, 1964

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1. NABET argues that the Seitz case, decided in 1939, 7 FCC 315, has applicability. The grounds for decision there (7 FCC at 319) were four: (1) The transferee was legally qualified; (2) The licensee was legally and technically qualified and, upon the transfer, would be financially qualified; (3) The transferee's proposal was in the public interest; and (4) Grant of the application would serve the public interest. There is no more to that case. Finally, passing criticism is made of assignee's reason for requesting Commission consent. They are as follows:

"The Assignor desires to dispose of its interests in Station WBFM so that it can concentrate its energies on its other business endeavors. It is convinced that the proposed Assignee, based upon its past broadcast experience, is well qualified to operate the station in the public interest and in a manner that will serve the needs of the area."

We submit that the assignee is a highly qualified broadcaster with a distinguished record of operation in the public interest, a licensee well qualified to operate WBFM.

Certificate of Service

Rec'd: March 6, 1964 [121]

OPPOSITION OF WPIX, INC.

Comes now WPIX, Inc., by its attorneys, and submits its opposition to the petition of the National Association of Broadcast Employees and Technicians, AFL-CIO (hereinafter referred to as NABET) to deny the above-referenced application, or, in the alternative, to designate it for formal hearing. In opposition to the petition it is stated as follows:

1. The petition of NABET is obviously without merit. In effect, the union is seeking to delay the consummation of this transaction, through its request for a Commission hearing before it gives its approval of the assignment, by advancing arguments which have already been made to, but rejected by, the Commission in cases where NABET could make a considerably stronger showing than here of possible injury to employees of the assignor.

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I.

THE NABET OBJECTIONS TO THE PENDING APPLICATION

2. The NABET petition raises two alleged material issues (¶ 7):

A. Whether the effect of the sale upon present employees of the selling company is an element of the public interest, convenience and necessity which the Commission must consider: and

B. Whether the refusal of WPIX to acknowledge NABET's bargaining rights contravenes national labor policies and is prima facie inconsistent with the public interest standard.

The second issue assumes that the response of WPIX, Inc. was ipso facto a violation of NABET's bargaining rights, a self-serving conclusion with which we strongly disagree, as will be explained later. Nevertheless, we shall follow NABET's breakdown of the so-called "issues" in the ensuing discussion.

II.
EMPLOYEE IMPACT AS A FACTOR FOR COMMISSION CONSIDERATION

3. As the question is restated by the NABET petition (¶ 7):

> "* * * whether a contract which on its face and by admission of the parties causes economic injury to the contractual rights and employment of skilled television [sic; WBFM is an FM station] personnel is prima facie inconsistent with the public interest unless the parties to the

> transaction advance some countervailing considerations of the public interest which grant of the application would serve."

Reference is also made to a "destruction of jobs" as if it were the intention of WPIX to replace the individuals engaged in the WBFM operations entirely with machines.

4. In the first place, the fears voiced by NABET in its statement of this artificial "issue" are premature. WPIX has not said that it will be unwilling to hire any of the present WBFM employees; indeed, it has expressly stated:

> "We may wish to consider the qualifications of some of the present WBFM employees, if we find a need when our plans are further along." Letter of January 31, 1964, attached to the Belack affidavit.

5. What NABET is doing is trying to protect the jobs of its members, and to force the assignee to hire its members as employees instead of turning the work over to members of its existing engineering staff who are members of a competing union.

6. There is a complete absence of any Congressional intent to charge this Commission with the duty of protecting job tenure of employees of a broadcast operation. Conceivably the Commission might properly consider, as a factor relevant to a proposed sale, whether the assignee or transferee proposes to convert a union-organized broad-

cast operation into an open shop hostile to unions. But that is not this case. As the affidavit of L.J. Pope, annexed, points out, WPIX has operated for years with its engineering employees represented by Radio

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& Television Broadcast Engineers' Union, Local 1212, IBEW, AFL-CIO. It does not expect to operate WBFM, if Commission approval is secured, with non-union employees.

7. There may or may not be "economic injury" to the present WBFM employees; it is much too early to select specific personnel with finality. Perhaps WPIX will offer employment to some of these individuals; perhaps Muzak, a division of the Seller, will offer to continue some of them in other jobs. There may be no economic injury.

8. It is urged by NABET that this Commission should, like the Interstate Commerce Commission and the Civil Aeronautics Board, refuse approval of any proposed license assignment, except upon detailed conditions which will protect tenure and seniority of affected employees.

9. The answer to this is that both the Interstate Commerce Commission and the Civil Aeronautics Board are regulatory agencies whose jurisdiction extends to common carriers.

10. The Communications Act of 1934, as amended, expressly provides that licensees of broadcast stations are not common carriers. Section 3(h) provides as follows:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this act; but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier." (underlining supplied)

The cases cited by NABET (the St. Paul Bridge and the United-Western cases) relate to common carriers whose activities are scrutinized by the Interstate Commerce Commission and by the Civil Aeronautics Board, and are thus readily distinguishable.

11. When Congress desired to impose protective conditions on the security of employees in the field of communications, it did so by the enactment of specific language in the Communications Act. Thus, in Section 222 of the Communications Act dealing with consolidations and mergers of telegraph carriers, it enacted into law detailed and specific restrictions applicable to the continued employment of persons who worked for the carrier immediately preceding the approval of the consolidation or merger. Section 222 (f) (1) provides:

> "Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consolidation or merger, and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry."*

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* The other subparagraphs of Sec. 222 are equally detailed and specific. Subparagraph (f)(2) concerns the effect upon employees who are discharged as a consequence of consolidations or mergers within four years from the date of approval by the Commission; (f) (3) gives a pre-

(Continued on following page)

But absence of such detailed provisions in Title III of the Act relating to licensees of broadcast stations is clear evidence of a Congressional intent not to apply this "National Labor Policy" to broadcast operations.

12. In its administration of Title III, the Commission has never considered the effect of assignments and transfers of control upon employees of the assignor or transferor as a proper element for inclusion under the standard of "public interest, convenience or necessity". If it were to do so, not only would broadcast licensees be treated as common carriers, but the Commission would be confronted with massive admin-

(Continued from preceding page)

ferential hiring or employment status to discharged employees; (f)(4) provides that in the event an employee was transferred from one community to another as a result of a consolidation or merger, the carrier shall pay actual travelling expenses of the employee and his family; (f)(5) protects affected employees as to their pension, health, disability or death insurance benefits; (5)(6) defines the rights of employees required to enter the military or naval forces of the United States; (f)(7) protects employees against the reduction of compensation, discharge or furlough; (f)(8) concerns the discharge of employees for insubordination, incompetency, or other similar causes; (f)(9) expressly states that "all employees of any carrier resulting from any such consolidation or merger, with respect to their hours of employment, shall retain the rights provided by any collective bargaining agreement in force and effect upon the date of approval of such consolidation or merger until such agreement is terminated, executed, or superceded; (f)(10) provides that affected employees are entitled to the same remedies as are provided by the National Labor Relations Act in the case of employees covered by that Act"; (f)(11) exempts employees whose compensation is at the rate of more than $5,000 per annum; (f)(12) defines the period during which certain employees are entitled to protection.

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istrative burdens. Indeed, the Commission has never inquired of proposed assignees or transferees whether an effectuation of the assignment or transfer might result in the discharge of existing employees, whether new or different employees would operate the stations, or whether there might be some reduction in force occasioned by desired economies. NABET cites no cases to the contrary. The Seitz case, 7 FCC 315, 318 (1939), referred to in the petition, clearly does not support the NABET position. Not only was the Seitz case decided 25 years ago, but the sentence quoted from the case by NABET was in no way "stressed," as asserted by the petitioner, but was made by way of passing. In the Seitz case, the question before the Commission was whether approval should be given to the transfer of control of a broadcast licensee where the price paid for the stock was substantially in excess of the value of the physical assets transferred. A hearing was held to determine the facts. The Commission approved the transfer, holding that the difference between the value of the assets and the purchase price for the stock was not an element of the public interest requiring denial of the application. The decision rested not at all upon the retention of the existing employees of the licensee.

13. NABET's reliance upon criteria, such as staff and careful planning, which the Commission employs in the decision of comparative

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cases has no bearing upon the instant cause. In comparative cases, the Commission is interested in the respective applicants' abilities to provide the program service proposed in the applications, which if clearly inadequate to enable an applicant to present the promised program service, may well be a black mark against that applicant. However, the Commission's decisions make it clear that if both of the competing applicants propose the utilization of staffs adequate to enable them to broadcast the proposed programs, no preference can be awarded to

either applicant. Thus, the decisions of the Commission in comparative radio or television cases are clearly not in point.

14. Moreover, the Commission has, on many occasions, permitted the broadcast stations which are in economic difficulty to go off the air without any inquiry as to the effect of such termination of operations upon the affected employees.

15. The NABET petition raises no question as to whether there will be a reduction in jobs, but simply a question as to who will perform the work. Contrary to NABET's contention (¶ 10), this presents no questions of the public interest. The only questions are purely private ones: which of the present six employees, if any, shall perform the work in the future, and which union shall represent them.

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THE NABET ALLEGATION THAT THE WPIX POSITION IS INCONSISTENT WITH NATIONAL LABOR POLICY AND THE PUBLIC INTEREST IS CLEARLY INCORRECT

16. By its repeated reference to "national labor policy", NABET has virtually conceded that this Commission is not the forum in which its present objections should be urged. The rights which NABET claims are violated are those secured by the National Labor Relations Act, the policies of which are to be enforced by an entirely different government agency, the NLRB.

17. The Supreme Court has unequivocally held that the Board is the exclusive agency charged by Congress with the duty of implementing national labor policy:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Garner v. Teamsters' Local 776, 346 U.S. 485, 490-491 (1953).

So, the Court has held that neither federal nor state courts may interfere in the Board's administration of the Labor Act for:

"It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959).

18. The NLRB clearly laid down the rules which determine whether a successor or transferee of a business inherits the collective bargaining agreement and the unit certification. One of the earliest cases is Herman Loewenstein, Inc., 75 N.L.R.B. 377 (1947). There the Board

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stated the rule to be as follows:

"While the Board has, on occasion, held that a purchaser is the successor of the seller and bound by the latter's obligations where the record discloses a continuity of interest and operations * * * the Board has also held that the mere purchase of certain physical assets, without the assumption of any obligation with respect to the employees of the seller, does not constitute the purchaser a successor of the seller or render the purchaser liable under any existing agreement between the seller and a labor organization."

19. The cases in this area are carefully reviewed in the decision for the Court of Appeals for the Second Circuit in N.L.R.B. v. Aluminum Tubular Corp., 299 F. 2d 595 (1962).

20. The principle involved is illustrated by a recent District Court decision, Intl. Assoc. of Machinists v. Shawnee Industries, Inc., ____ F.Supp. ___, 55 LRRM 2394 (W.D. Okla. 11/6/63). Shawnee had purchased certain of Jonco's assets, and was continuing its business. Jonco had a collective bargaining agreement, but Shawnee refused to be bound by the agreement and refused to recognize the Machinists as the representative of the employees. The union brought an action under §301 of the Taft-Hartley Act for a declaration of its rights under the contract. The court first noted that any question of unfair labor practice, such as refusal to bargain or the determination of the appropriate bargaining unit, "are matters properly to be submitted in the first instance to the NLRB," adding:

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"Such questions as to appropriateness of the bargaining unit, its survival of a change of employer-owners, and a refusal to bargain toward a collective bargaining agreement are not before this Court."

On the substantive question whether the successor company was bound by the agreement, the court said flatly:

"The purchase of certain of the assets of Jonco and the assumption of some of their outstanding obligations in and of themselves do not make Shawnee Industries a legal successor of Jonco and as such bound by the collective bargaining agreement."

A fortiorari, the result should be the same in the instant case where the selling company had disposed of only a small part of its assets and had continued in business.

21. Despite NABET's flat assertion that it has demanded (and has been refused) recognition by WPIX as the collective bargaining agent of the WBFM employees, this has not happened. The union's letter asks whether WPIX will accept and become a party to the Muzak-NABET contract; the reply given was that "when our plans are further along" some of the WBFM employees may be considered for WPIX employment. While the point is not of great importance in the context of a transfer application to this Commission, these facts do not show either a demand for bargaining, or a refusal on the part of the employer constituting an unfair labor practice. See N.L.R.B. v. Rural Electric Co., 296 F. 2d 523, 24 (C.A. 10th, 1961). In any case, the question is one which should be considered only by the NLRB in accordance with its

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established rules and precedents.

22. Surely this Commission would hesitate to announce as a future policy that any purchaser of the assets of a broadcast licensee must assume, as part of the assets, all existing collective bargaining contracts, even if it was expressly agreed between the parties to the sale

transactions that no such assumption was made. Not only might this cause a head-on collision between the Commission and the Labor Board (whose holdings to date certainly do not indicate any such per se transferee liability), but it could put the Commission in the difficult position of giving rise to jurisdictional struggles between labor unions in the very industry which it regulates.

23. We may use the present case as an example of how this might operate. The Engineering Department employees of WPIX for more than 15 years have been represented by IBEW Local 1212. NABET, the present petitioner, was represented in 1948 at hearings before the Labor Board in which the original determination was made that the engineering employees of WPIX constituted an appropriate bargaining unit. In the ensuing election Local 1212 won a clear majority of the votes, and was duly certified as the representative of those employees.

24. It is a matter of public knowledge in the industry that IBEW Local 1212 and NABET are rival unions. Should the Commission's approval of the pending application be somehow conditioned upon WPIX taking over the NABET agreement, the only NABET request to date,

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and should WPIX be compelled to absorb within its Engineering Department employees who are members of NABET, internal struggles between the incumbent and the newly arrived union may be surely anticipated.

25. It is not readily apparent how this situation will better enable WPIX to discharge its license responsibility of serving the public interest. One must suspect, under these circumstances, that NABET is less interested in safeguarding jobs of its members than in driving an opening organizational wedge into the longstanding collective bargaining relations between WPIX and a rival union.

26. NABET in its opposition relies almost entirely on the dissenting opinion of Commissioner Loevinger in Rockford Broadcasters, Inc.,

1 R. R. 2d 405 (1963). The Commission majority, however, decided the Rockford case against the NABET position, and the instant case presents a situation where the NABET argument has substantially even less merit.

27. The disagreement between Commissioner Loevinger and the rest of the Commission turned on the question whether the transferee's refusal to grant prospective recognition to NABET "portends a policy toward station employees contrary to public policy on collective bargaining" (1 R.R. 2d at 413). The Commission held that it did not. Commissioner Loevinger felt otherwise, in part, apparently, because although the transferee would take over the WROK staff, it admitted an intention

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to eliminate certain existing employee benefits. But his dissent does not indicate that he would have similar misgivings where the question was not whether any union would represent the employees, but merely which union would do so. While Rockford may have presented questions as to whether any union would have an opportunity to bargain for employees, the only question here is which union shall emerge as the bargaining representative.

28. Moreover, it is noteworthy that the Commission majority expressly recognized the salutary rule that considerations involving wages, hours and terms and conditions of broadcast employment lie within the primary, if not the exclusive jurisdiction of the Labor Board.

29. In summary, then:

a. Clearly NABET has no rights against WPIX under the collective bargaining agreement governing the employment of employees engaged in the operation of WBFM.

b. In any case, this Commission is not an appropriate forum in which to adjudicate such rights.

c. The most that the Commission ought to be concerned with on the present application is whether the trans-

feree has exhibited union hostility and intends to deny any employees any rights safeguarded to them by Congressional enactments. Patently such a charge is absurd in the case of WPIX.

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30. Accordingly, it is urged that NABET's petition should be denied.

Respectfully submitted,

WPIX, INC.

/s/ Percy H. Russell
Attorney for WPIX, Inc.

March 4, 1964

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

L. J. Pope, being duly sworn, deposes and says:

1. I am Vice President in Charge of Operations for WPIX, Inc., the proposed transferee. I personally conducted the negotiations with Muzak Corporation which culminated in the agreement of sale now before the Commission for approval.

2. During the course of such negotiations, the question arose as to what the plans of WPIX would be with respect to the present employees of the station who I learned were represented by NABET. I informed the seller that at that time we could not and would not agree to take over their employees or their union contract, but had to leave open for future determination the question of the designation of the specific employees who would operate the station.

3. My primary reason for taking this position was that WPIX, Inc., has had a long-standing collective bargaining relationship with Radio &

Television Broadcast Engineers' Union, Local 1212, IBEW, AFL-CIO. The contract provides that the union's jurisdiction extends to all em-

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ployees engaged in "radio broadcast" operations. While WPIX is a television station and we now have no radio broadcast operation, it is by no means inconceivable that Local 1212 would claim jurisdiction over the WBFM operation under the terms of the existing contract. Moreover, it is my understanding that both IBEW, Local 1212 and NABET are rivals in this field, and needless to say, we would not wish to become involved in a jurisdictional dispute between these two unions.

4. My only communication with NABET has been the letter from Miss Belack annexed to the petition herein, to which a copy of my reply is also attached, and a telephone call inquiring when I would reply to her letter. I point out here that NABET did not ask us to recognize it, but simply inquired whether we would agree to become a party to the existing contract with Muzak, and this I declined to do.

5. When WPIX began its television broadcast operation in 1948, NABET was one of the unions contending for the right to represent our technical employees. After hearings before a National Labor Relations Board officer on the question of an appropriate unit, and an ensuing election, the Board certified IBEW Local 1212 as the collective bar-

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gaining representative of those employees.

6. It goes without saying that WPIX, Inc., bears no hostility toward unions in general, nor toward NABET in particular. At the present time we have collective bargaining agreements with six separate unions representing different classes and groups of our employees.

7. NABET refers to the fact that the agreement to acquire the assets of WBFM requires us to take over advertising contracts, as contrasted with union contracts. Actually, to permit a smooth transition

at an indeterminate future date, and in order to enable the seller to continue operation of the station in the interim, we stipulated that we would assume only those advertising contracts which are enumerated in the contract schedule, the latest date of which is July 30, 1964, plus contracts which were executed between the date the schedule was prepared and the date the contract of sale was executed, together with our other contracts to which we gave consent. We are unwilling to assume any long-term commitments, whether for time sales, programs or personnel. To do otherwise might possibly prevent us from putting into effect the program policies and commercial practices which we feel would best serve the public interest.

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8. Finally, I am unable at this point to designate the particular persons who will operate the FM station, as I informed Miss Belack in my reply to her. It may be that we will wish to offer jobs to some of the present WBFM employees if we have such need after considering our existing technical staff. In any case, a prime consideration will be the efficient operation of the FM station with employees interchangeable with the television operation, so that at all times an adequate staff will be available for emergencies in either station.

[Jurat dated March 2, 1964]

By /s/ L. J. Pope
Vice President

Certificate of Service

[156] Rec'd: May 19, 1964

SUPPLEMENTAL PETITION TO DENY

Because of a recent decision of the United States Supreme Court in John Wiley & Sons, Inc. v. Livingston, 32 U.S.L. Week 4285, the National Association of Broadcast Employees and Technicians, AFL-CIO (herein NABET), wishes to supplement its petition to deny in this case so that the Commission may consider the significance of the cited Supreme

Court decision on the issues involved in this case.

1. In NABET's reply to oppositions to petition to deny, filed March 10, 1964, we said that obviously we did not expect the FCC to adjudicate matters within the jurisdiction of the NLRB, but that in the very nature of a transfer proceeding there can be no NLRB adjudication until after the transaction has been consummated. NABET cannot file charges against a non-employer. As we then pointed out, the question is not whether the National Labor Relations Act has been violated -- a question exclusively reserved to the jurisdiction of the NLRB -- but is whether the proposed buyer has shown a disposition to ignore national labor policy to encourage collective bargaining. This was, in essence, the whole point of the dissent of Commissioner Loevinger in Rockford Broadcasters, Inc., 1 R.R. 2d 405 (1963).

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2. Now in the Wiley decision the Supreme Court has established a new and significant principle in the developing law governing collective bargaining agreements which completely vindicates and supports the views expressed by Commissioner Loevinger in his dissent in the Rockford case. The Supreme Court holds that a new owner of a business enterprise is bound by the collective bargaining agreement between the old owner and the union representing the employees, whether or not there is any "successor" clause in the agreement and whether or not the new owner had agreed to assume the obligations of the agreement.

3. Applied to the facts of the present case, this means that the entire argument of WPIX at paragraphs 16 through 27, pages 9 to 14 of its opposition to the petition to deny, is no longer even relevant. As the Supreme Court said in Wiley, the manner in which a new owner acquires the business is irrelevant when considering whether the new owner is complying with national labor policy:

> "It would derogate from 'the federal policy of settling labor disputes by arbitration,' United Steelworkers v. Enter-

> prise Wheel & Car Corp., 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same." (Emphasis supplied)

In other words, where the business remains essentially unchanged, a change in ownership will no longer be a basis for upsetting an existing collective bargaining agreement.

4. The Supreme Court decision in Wiley necessarily overrules prior state, federal and Labor Board decisions in conflict with it. The traditional common law of contracts does not apply to collective bargaining agreements, as Commissioner Loevinger anticipated in his

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Rockford dissent. As the Supreme Court said in Wiley, "a collective bargaining agreement is not an ordinary contract..... It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." The new employer is obligated to comply with the existing agreement, not to negotiate a new one, or to decide unilaterally that he may ignore the old one. Old employees retain employee status and seniority rights unless there is cause for discharging them under the agreement.

5. In view of the Wiley decision, it must now be concluded that the buyer's straightforward refusal to recognize the NABET contract is not only a violation of national labor policy. It also directly exposes the buyer, if the contract is consummated, to a suit for breach of contract under Section 301 of the Labor Management Relations Act of 1947, as amended, and possibly also unfair labor practice charges and arbitrations.

WHEREFORE, NABET, as petitioner herein, respectfully repeats

that absent a commitment by the buyer to assume the existing collective bargaining contract with NABET, the pending application should be denied, or, in the alternative, designated for evidentiary hearing.

Respectfully submitted,

Warren Woods
Jerome Y. Sturm

Attorneys for National Association of Broadcast Employees & Technicians, AFL-CIO

Certificate of Service

Date: May 19, 1964

[160] Received May 25, 1964

REPLY TO "SUPPLEMENTAL PETITION TO DENY"

Wrather Corporation, licensee of Station WBFM, by its attorneys, hereby responds to the Supplemental Petition of the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET) as follows:

I.

The Pleading is Untimely

1. Nothing in the Commission's Rules and Regulations countenances the filing of supplemental pleadings of this nature. (See Section 1.45(c) of the Commission's Rules.) We respectfully suggest that the Commission may well wish, as a matter of policy, to ignore the pleading for this reason. The acceptance of supplemental pleadings long after the filing dates have passed could establish an unfortunate precedent.

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II.

NABET Misconstrues the Wiley Case

2. NABET cites John Wiley & Sons, Inc. v. Livingston, 32 U.S.L. Week 4285, in support of the proposition that absent a commitment by WPIX, Inc., to assume the existing collective bargaining contract with NABET the pending application should be denied or, in the alternative, designated for evidentiary hearing. It is submitted that NABET misconstrues Wiley. NABET argues that the case stands for the proposition (Supplemental Petition to Deny, p. 2, par. 2) that:". . . a new owner of a business enterprise is bound by the collective bargaining agreement between the old owner and the union representing the employees, whether or not there is any 'successor' clause in the agreement and whether or not the new owner had agreed to assume the obligations of the agreement." This is exactly the point which the case does not decide.

3. Justice Harlan, speaking for a unanimous court (Justice Goldberg not participating), stated in unequivocal language (32 U.S.L. Week 4286 and 4287) that: "In addition, we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership (citing cases)."

4. Wiley deals with an arbitration problem. The question involved is whether the merger of a unionized corporation into a non-unionized corporation relieved the survivor of the duty to arbitrate assimilated

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employee's grievances pursuant to the unionized corporation's pre-merger bargaining contract. The court answered the question in the negative, pointing out that the survivor question is for the courts and not the arbitrator.[1]

5. Justice Harlan in clear language stated the issue and the holding as follows (32 U.S.L. Week, 4286):

"Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the union's claim to arbitration depends, is bound at all by the agreement's arbitration provision."

* * *

"We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement,and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement."

6. The basic question for Decision from the standpoint of the Commission is whether the public interest would be served by a grant of the instant application. NABET would put the question differently, i.e., whether the proposed buyer has shown a disposition to ignore the National Labor policy to encourage collective bargaining. We submit that there is nothing contained in any of the documents before the Commission in

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1 The Supreme Court also held that procedural questions growing out of an arbitrable dispute and the bearing on the dispute's final disposition should be left to the arbitrator.

this case that leads to the conclusion that the NABET question must be answered affirmatively. NABET's allegations fall far short of showing that a grant of the instant application would be prima facie not in the public interest.

7. Wiley is far from helpful to NABET here. If NABET has a right and WPIX, Inc., chooses to ignore that right (a proposition which we vigorously deny) and Wiley stands for the proposition asserted by NABET, WPIX, Inc., the corporate employer, must arbitrate with WPIX under the existing agreement. In any event, Wiley does not hold that where the assignee proposes to acquire a broadcast station, subject to

the approval of the Federal Communications Commission, the Commission must insist, as a condition precedent, that the assignor agree in advance to assume the existing collective bargaining agreement of the assignor. Obviously, Wiley does not require the Commission to take this position where the assignee already has a union contract.[2]

8. At best, the Commission is concerned here with (a) whether the assignee has exhibited any hostility toward employees and (b) whether the assignee intends to deny any employees any rights safe-guarded to them by law and by National Labor policy. Either charge is without foundation.

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[2] In the affidavit which supports the "Opposition of WPIX, Inc.," dated March 4, 1964, the Vice President of WPIX, Inc., has this to say (p. 2, par. 6): "It goes without saying that WPIX, Inc., bears no hostility toward unions in general, or toward NABET in particular. At the present time, we have collective bargaining agreements with six separate unions representing different classes and groups of our employees."

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The assignment should be granted and the petition denied.

Respectfully submitted,

WRATHER CORPORATION

By /s/ Thomas H. Wall
By /s/ John B. Jacob
Attorneys for Wrather Corporation

May 25, 1964

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Received: May 27, 1964

OPPOSITION TO SUPPLEMENTAL PETITION TO DENY

Comes now WPIX, Inc., by its attorneys, and submits its opposition to the supplemental petition of the National Association of Broadcast Engineers and Technicians, AFL-CIO (hereinafter referred to as NABET) to deny the above-referenced application, or, in the alternative,

to designate it for formal hearing. In opposition to the supplemental petition it is stated as follows:

1. The further and untimely attempt by NABET to compel its immediate recognition by WPIX, Inc., based upon the unsupported and reckless charge that WPIX, Inc. is one of those employers which have "shown a disposition to ignore national labor policy to encourage collective bargaining" (Sup. Pet., p. 1), receives no assistance whatever from the Supreme Court's decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. ____, 32 U.S. Law Week 4285. Indeed, the court's

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careful delineation of the circumstances in which a purchaser will be held to have succeeded to the obligations of an acquired company under a subsisting collective bargaining agreement shows that a contrary result would have been reached here.

2. The Wiley case presented the question whether the purchaser was bound by the labor contract of the acquired company to arbitrate grievances asserted by the union representing certain employees of that company, in these circumstances:

(a) Where the mechanism of acquisition was a consolidation of or merger between the two companies, pursuant to a state statute providing that claims against each constituent corporation survived consolidation;

(b) Where the acquiring company was non-union, and it refused to deal with the union representing those employees;

(c) Where the union grievances covered such matters as seniority, pension fund contributions, severance and vacation pay, and grievance procedures.

3. Wiley was ordered unanimously by the court to arbitrate those grievances. Mr. Justice Harlan's opinion notes that the encouragement

of arbitration would be hindered by a ruling that "a change in the cor-

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* We are advised by New York counsel that there is no statute imposing a like obligation on the purchaser of part of the assets of a going business, although trade creditors of the seller may in some cases have a claim against the buyer under the Bulk Sales Law.

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porate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established," and then illustrated two classes of cases where such a result would be inappropriate:

> 1. Where the contracting employer disappears into another by merger;
>
> 2. Where one owner has replaced another but the business entity remains the same.

4. This case is neither of these. Wrather Corporation, the assignor, proposes to sell a part of its business, but otherwise to continue its Muzak operations. It is not going to "disappear" into WPIX if this transaction is approved. Nor is this familiar case where the shareholders of a business sell their interest to newcomers, who thereupon seek to disavow an existing union contract to which the business is a party. Instead, we have here a sale by a company of some of the assets used in a part of its business. The Supreme Court's warning that "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives" shows that the Court had no intention of converting a collective bargaining agreement into a kind of covenant running with the land, binding upon all successive assignees of the original contracting party.

5. Moreover, the Supreme Court made it plain that the Wiley case

did not involve a "problem of conflict with another union" (fn.5).* This is precisely the problem described in our original opposition: WPIX has an existing collective bargaining agreement with the other union that competes with NABET in the broadcast field, and NABET is obviously seeking to use this Commission as leverage by which it can force its way into an IBEW shop.

6. Finally, NABET warns WPIX that if this deal is consummated, the latter may find itself involved in suits for damages by NABET, unfair labor charges and arbitration demands (Supp. Pet. par. 3). While we regard these threats as insubstantial, we nevertheless wish to make it plain to the Commission that if and when NABET takes these steps WPIX stands ready to defend against them. It would be difficult to find a franker admission that if NABET has any recourse against WPIX, there are adequate judicial and arbitration forums in which it may assert them. Clearly this Commission is not such a forum and NABET's opposition to the proposed transfer should be overruled.

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* The Supreme Court cited L. B. Spear and Co., 106 N.L.R.B. 687 (1953), on this point. In that case, Spear acquired 92% of the stock of another company. The latter company was kept as a separate corporate entity, but there was a complete merger and integration of personnel and operations. Spear had its own union, and sought an election in a single unit comprised of the employees of both companies. The union representing employees at the acquired company resisted, claiming that its contract was a bar to such an election. The Board held that the old unit no longer existed and that a new election should be ordered, adding that "sound and stable labor relations will best be served by allowing the employees in the reconstituted units to determine for themselves the labor organization which they now desire to represent them." See also M. B. Farrin Lumber Co., 117 N.L.R.B. 575 (1957), and the Second Circuit's discussion in the Wiley case (313 F.2d at pp. 56-57).

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7. We submit that NABET's untimely supplemental petition presents no legal or factual basis that would warrant denial or further delay in the grant of the pending application.

Respectfully submitted,

WPIX, INC.

By /s/ Percy H. Russell
By /s/ Kelly E. Griffith
Attorneys for WPIX, Inc.

May 25, 1964

[182] FCC 64656 53250

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Ford and Cox dissenting.

1. The Commission has before it for consideration (a) the above-captioned applications; (b) a petition filed February 18, 1964 by the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET) to deny said applications or alternatively to designate them for hearing and allow NABET to intervene as a party in interest; (c) pleadings relating to said petition; (d) a supplemental petition filed May 19, 1964 by NABET; and (e) pleadings relating thereto.

2. Petitioner alleges in its first petition that since November, 1961 it has engaged in collective bargaining, pursuant to certification by the National Labor Relations Board (N.L.R.B.), to establish the wages, hours, and working conditions of the employees of the station in an appropriate bargaining unit of "approximately six employees classified as operators and operators-engineers;" that there is in effect a collective bargaining agreement between NABET and Station WBFM which will expire November 6, 1964; that the buyer in the subject applications, in answer to a letter from NABET asking if the buyer would also recognize NABET as the bargaining representative by becoming a party to the agreement, stated that the retention of assignor's person-

nel was not included in the contract to sell and that it did not expect it would need additional technical personnel because it had a substantial staff in connection with its television station; and that this refusal by the buyer to agree to assume NABET's collective bargaining agreement with the seller constitutes sufficient allegations that petitioner

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will suffer injury of a direct, tangible and substantial nature as a result of this assignment and, as such, establishes NABET as a party in interest.

3. NABET further alleges that a grant of this application would be prima facie inconsistent with the public interest, convenience and necessity because the buyer's alleged refusal to bargain collectively contravenes national labor policy. NABET's petition is accompanied by an affidavit from Eleanor Belack, NABET's regional representative in New York City, and copies of her letters to and the reply from the buyer concerning its adherence to the collective bargaining agreement.

4. In its opposition to the petition the buyer, WPIX, Inc., alleges that NABET's argument that all of the workers it represents would be fired is speculative since in its letter to NABET it stated that "We may wish to consider the qualifications of some of the present WBFM employees, if we find a need when our plans are further along." The buyer further alleged that this question of individual workers' rights is a matter of private rights and is not within the Commission's jurisdiction; that the Commission is not the proper forum before which such rights should be adjudicated; that if Congress had wanted the Commission to have this jurisdiction it would have specifically so stated; that there is no national labor policy question here as the buyer's engineering department employees at its television station have been unionized since 1948 by International Brotherhood of Electrical Workers (IBEW); that IBEW and NABET are "rival unions" and that this is not a question of union versus non-union but of union versus union. The buyer's opposition

includes an affidavit from L. J. Pope stating that he is Vice-President in Charge of Operations for WPIX, Inc.; that he wrote the letter answering NABET's query about the buyer's proposed labor relations policies; that his primary reason for taking this position about not agreeing to take over the seller's employees or their union contract was that WPIX, Inc., has had a long-standing collective bargaining relation with Radio and Television Broadcast Engineers' Union, Local 1212, IBEW, AFL-CIO; and that the contract provides that the union's jurisdiction extends to all employees engaged in "radio broadcast" operations.

5. In its separate Opposition to the Petition the seller, Wrather Corp., concedes that the petitioner has alleged facts sufficient to give it standing as a party in interest under Section 309(d) of the Communications Act. However, it alleges that the private employment rights of the six workers concerned should not be adjudicated by the Commission but before some more suitable forum; that as a matter of "established contract law in New York" a reference "to successors and assigns" of the

employer in the preamble or recitals of a labor contract forms no part of the contract itself and as a consequence such a contract is not assignable to a succeeding employer without his consent; and that no national labor policy will be violated because the buyer has other union contracts and is willing to negotiate with anyone who will be employed by the station.

6. In its reply to the two Oppositions NABET argues that if the jobs and job rights of the six persons now working for WBFM are to be extinguished, some proof of countervailing considerations of the public interest should be offered; that since none have been advanced, a hearing is required to determine if the public interest will be served by the sale of a radio station entailing the possible loss of jobs by six persons. NABET also alleges that the national labor policy issue turns not on a question of whether the National Labor Relations Act has been violated

"but instead whether the proposed buyer has showed a disposition to ignore national labor policy to encourage collective bargaining."

7. On May 19, 1964, NABET filed a supplemental petition to deny this application restating that the question is whether the proposed buyer "has shown a disposition to ignore national labor policy to encourage collective bargaining" and discussing the recently decided case of John Wiley & Sons, Inc. v. Livingston, -- U.S. --, 11 L. Ed. 2d. 898, 84 S. Ct. --, 32 U.S.L. Week, 4285 in which the Supreme Court answered in the affirmative the question of "whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer..." (11 L.Ed. 2d at 901). NABET argued that that decision requires the buyer here, WPIX, Inc., to become a party to the collective bargaining agreement between NABET and Wrather Corporation and that by failing to state in advance of the grant of the assignment that it will become such a party is in violation of national labor policy.

8. Oppositions to this supplemental petition were filed by both Wrather and WPIX, Inc. Wrather contends that the petition is untimely and not in accordance with Section 1.45 (c) of the Commission's Rules;[1] and argues that the Wiley case, involves solely an arbitration issue, a question whether the merger of a unionized corporation into a non-unionized corporation relieved the survivor of the duty to arbitrate assimilated employee's grievances pursuant to the unionized corpora-

[1] Section 1.45(c) provides: Additional pleadings may be filed only if

tion's premerger bargaining contract; that the case does not apply to this transaction because there was no other union involved, whereas WPIX, Inc., is a party to a collective bargaining agreement, albeit with another union; that the Commission can only be concerned with the questions of "(1) whether the buyer has exhibited hostility toward employees and (2) whether the assignee intends to deny any employees any

rights safe-guarded to them by law and by national labor policy"; and that neither question is here involved.

9. WPIX, Inc., in its opposition to the supplemental petition, also argues that Wiley is distinguishable from this assignment, and advances arguments similar to those of Wrather, stressing that Wiley concerned a merger of two corporations, not a sale by a corporation of one relatively small part of its business; and that the Supreme Court had indicated (in a footnote, at 11 L.Ed. 2d. 906), that a different result might have been reached if another union were affiliated with the merged corporation. In response to NABET's assertion that consummation of this assignment would subject WPIX to various legal actions by NABET involving breach of contract and charges of unfair labor practice, WPIX stated that if such suits would be brought in the proper forums they would be answered.

10. The Commission is of the opinion that NABET has demonstrated that it is a party in interest. Rockford Broadcasters, Inc. 1 Pike & Fischer RR 2d. 405 (1963) and Transcontinent Television Corporation 21 Pike and Fischer RR 945 (1961). However, we are of the view that NABET has failed to allege any matter demonstrating that a grant of the above-captioned application would not serve the public interest.

11. NABET's objections to this assignment are, in effect, centered in two principal issues: (1) whether an assignment which may result in the loss of jobs by employees of the station currently represented by NABET under a contract expiring November 6, 1964 is in the public interest; and (2) whether the refusal of WPIX, Inc. to assume the contract between NABET and the assignor's employees (even though it intends to continue its collective bargaining relation with another union) contravenes national labor policies and is prima facie inconsistent with the public interest.

12. The issue of the claim of continuing job rights by the six technical employees of WBFM, even after a station sale, is not a matter within this Commission's jurisdiction. We have long held that such

claims must be brought in the appropriate forum, be it the civil courts or before the NLRB.
Transcontinent Television Corporation (op. cit.) and A. A. Schmidt 14 Pike and Fischer RR 1156 (1957).

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13. As to whether WPIX Inc.'s position, in regard to becoming a party to or assuming the contract with NABET, violates or demonstrates a disposition to ignore national labor policy we think it does neither. WPIX Inc.'s pleading contains uncontroverted representations concerning the existence of its present collective bargaining agreements and its intentions not to deny union representation to any future employees of WBFM. If it is later determined by appropriate authorities that WPIX, Inc.'s actions did constitute an unfair labor practice it would appear to be a conclusion reached from a reasonable difference in interpretation and not one reflecting on the character qualification of the assignee. Cf. Greater Huntington Radio Corp., 14 Pike & Fischer RR 270c (1956). Although the Commission is not bound to consider any new matter contained in NABET's supplemental petition not filed in accordance with Commission Rule 1.45(c) we have nevertheless carefully considered the John Wiley & Sons case and conclude it is not applicable to the facts of the subject dispute.

14. In view of the foregoing IT IS ORDERED That the Petition to Deny applications filed by NABET is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/S/ Ben F. Waple

Adopted: July 15, 1964
Released: July 20, 1964

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,849

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
AND TECHNICIANS, AFL-CIO,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

The parties to this proceeding by prehearing stipulation filed herein and approved by Order of this Court dated October 5, 1964, have stipulated the issues of this proceeding to be as follows:

1. Whether the Commission acted erroneously in granting without hearing the application for assignment of the license of Station WBFM despite appellant's contention that the assignment would adversely affect the future job rights of the station's employees.

2. Whether the Commission acted erroneously in determining without hearing, that WPIX, Inc., the proposed assignee of the WBFM licensee, was qualified to be a licensee of the Commission notwithstanding appellant's contentions that assignee has ignored appellant's bargaining rights and that such actions contravene national labor policy.

3. Whether the Commission acted erroneously in determining, without hearing, that a grant of the assignment application would be consistent with the public interest, convenience and necessity.

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TABLE OF CITATIONS

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*Cases or authorities chiefly relied on are indicated by asterisks.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 18,849

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a Memorandum Opinion and Order of the Federal Communications Commission issued July 20, 1964, denying without hearing a petition filed on February 18, 1964 by the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET) to deny the applications of Wrather Corporation, as assignor, to transfer its license to WPIX, Inc., as assignee, or in the alternative to designate them for hearing and allow NABET to intervene as a party in interest. (R.182-186)

The jurisdiction of this Court is invoked under Sec. 402(b)(6) of the Communications Act of 1934, as amended (48 Stat. 1093, 47 U.S.C. Sec. 402 (b)(6)), Sec. 10 of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1009) and Rule 37 of the rules of this Court.

Notice of Appeal and Statement of Reasons Therefor was filed with this Court on August 18, 1964, within thirty days from the date on which public notice was given of the Memorandum Opinion and Order of July 20, 1964, now complained of, as required by Sec. 402(c) of the Act.

STATEMENT OF THE CASE

The pertinent facts, about which there is little if any dispute, may be summarized as follows:

NABET is a labor organization affiliated with the AFL-CIO and representing engineers, technicians and other employees in the broadcasting industry. Pursuant to certification by the National Labor Relations Board it has engaged in collective bargaining since November, 1961 with Wrather Corporation, licensee of radio station WBFM in New York City (herein WBFM), to establish the wages, hours and working conditions of employees of the station in an appropriate unit for purposes of collective bargaining of approximately six employees classified as operators and operator-engineers. (R.108) There is now in effect a collective bargaining agreement between NABET and WBFM which will expire on November 6, 1964. In addition to the usual provisions governing wages, hours and working conditions, the agreement includes a union security clause and provisions for vacation, severance pay, insurance and hospitalization plans. (R.108)

On or about January 15, 1964, Wrather Corporation and WPIX, Inc. filed

applications for Commission consent to the transfer of the licenses of WBFM as assignor to WPIX, Inc. as assignee, for a total consideration of $400,000. The underlying contract provided that the buyer was to purchase "all assets," including physical equipment, record library, all licenses, files and records, contracts and agreements existing at time of sale and program production agreements "to the extent they are assignable." (R.51-52) The contract also provided that except as set forth in paragraph 2(b) the agreement did not require the buyer to employ or otherwise incur any liability to any person employed by the seller. Paragraph 2(b) referred only to contracts with advertisers and program production agreements. (R.54)

Promptly after being informed that an application for Commission consent to transfer of license had been filed, Eleanor Belack, Regional Representative for NABET in New York City, wrote a letter, dated January 20, 1964, to the Executive Vice President of WPIX, Inc. notifying him of the existing collective bargaining agreement between WBFM and NABET and asking him whether WPIX, Inc. would continue to recognize NABET as the bargaining representative by accepting the "terms and conditions of the existing Agreement" and "becoming a party thereto." (R.110) By letter of January 31, 1964, the Vice-President in Charge of Operations of WPIX, Inc. replied to the January 20 letter that the purchase of WBFM included only certain assets and that personnel and contracts were not included in the understanding. He added that although final plans had not been made as yet, the company did not expect it would need additional technical personnel because it already had a substantial staff in connection with the television station. (R.111)

On the basis of these facts NABET on February 18, 1964 filed its petition to deny the applications or in the alternative to designate them

for formal hearing. It argued that Secs. 309(d) and (e) of the Act permit the Commission to grant a transfer application without hearing only if the Commission finds on the pleadings and representations made to it there are no substantial and material questions of fact and the grant will meet the public interest, convenience and necessity standard. A prima facie showing of adverse effect of approval of the applications upon the employees involved thus required an evidentiary hearing because such an adverse effect was one important element of the public interest, convenience and necessity. It argued further that the refusal of the buyer to recognize NABET's bargaining agreement and its bargaining rights contravened national labor policy and therefore disqualified the buyer to be a licensee of the Commission. Finally it urged that without hearing and some showing by the applicants of countervailing considerations in the public interest leading to possible improvement in service to the public flowing from the proposed transactions which would reasonably outweigh the adverse effect of the transaction on the employees involved, the requisite statutory finding that the application would serve the public interest, convenience and necessity could not be made. (R.102-105)

In its opposition to the petition the buyer, WPIX, Inc., argued that the question of individual workers' rights is a matter of private rights and is not within the Commission's jurisdiction; that the Commission is not the proper forum before which such rights should be adjudicated and that there is no national labor policy question here as the buyer's engineering department employees at its television stations have been unionized since 1948 by another union and that since this union is a rival union to NABET, the case involves a question of union versus union and not a question of union versus non-union. (R.121-135) In an attached affidavit by the Vice-President in

Charge of Operations for WPIX, Inc., he stated that the primary reason for taking the position about not agreeing to take over the seller's employees or their union contract was that WPIX, Inc. has had a long-time collective bargaining agreement with another union and its contract with that union provides that the union's jurisdiction extends to all employees engaged in "radio broadcast" operations. (R.136-139) In a separate opposition to the petition the seller, Wrather Corp., made substantially the same arguments. (R.112-120)

In its reply to the two Oppositions NABET argued that if the jobs and job rights of the employees of WBFM have been adversely affected, some proof of countervailing considerations in the public interest should be offered to justify grant of the applications; that since no such proof has been offered, a hearing is required to determine if the public interest will be served by the assignment of the license to a new owner. NABET argued further that the buyer's actions on the basis of the uncontroverted facts showed a disposition to ignore national labor policy to encourage collective bargaining and hence raised a prima facie question as to the buyer's qualifications to be a broadcast licensee. (R.141-144)

Subsequently, on May 19, 1964, NABET filed a supplemental petition to deny in which it called the Commission's attention to the recently decided case of John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 11 L. Ed. 2d. 898, 84 S. Ct. 909 (1964), and urged that this decision reinforced its argument that the buyer had shown a disposition to ignore national labor policy to encourage collective bargaining. (R.156-158)

Oppositions to this supplemental petition were filed by both WPIX, Inc.

and Wrather. In substance the two oppositions argued that Wiley was distinguishable from this assignment on the facts because it concerned a merger of two corporations, not a sale by a corporation of one relatively small part of its business and that the Supreme Court had indicated that a different result might have been reached if another union, as here, had been affiliated with the merged corporation. (R.160-170) Wrather also argued that the Commission could only be concerned with the questions of whether the buyer had exhibited hostility toward employees and whether the assignee intended to deny employees any rights safeguarded to them by law and by national labor policy, and that neither question was here involved. (R.163)

In its Memorandum Opinion and Order issued July 20, 1964, the Commission summarized NABET's arguments as centering on two principal issues which it phrased as follows:

> ". . . (1) whether an assignment which may result in the loss of jobs by employees of the station currently represented by NABET under a contract expiring November 6, 1964 is in the public interest; and (2) whether the refusal of WPIX, Inc. to assume the contract between NABET and the assignor's employees (even though it intends to continue its collective bargaining relation with another union) contravenes national labor policies and is prima facie inconsistent with the public interest." */ (R.185)

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*/ This summary is an oversimplification of NABET's position. It repeatedly argued that where a prima facie showing of adverse effect of a proposed transaction upon the employees involved had been made and no countervailing considerations were advanced to establish that the public interest, convenience and necessity would be served by a grant of the applications, the Commission was required by statute to hold an evidentiary hearing to determine whether a grant was justified. The Commission's decision ignores this argument.

On these assumptions as to NABET's principal arguments, the Commission then concluded that (a) the continuing job rights of employees after a station sale was not a matter within the Commission's jurisdiction and (b) that nothing in the record persuaded the Commission that WPIX, Inc. had demonstrated any disposition to ignore national labor policy and in its opinion the Wiley case "is not applicable to the facts of the subject dispute." (R.186) It observed that if it were later to be determined that WPIX's actions constituted an unfair labor practice, "it would appear to be a conclusion reached from a reasonable difference in interpretation and not one reflecting on the character qualification of the assignee." (R.186)

As noted NABET promptly filed a Notice of Appeal and Statement of Reasons Therefor.

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended (48 Stat. 1082; 47 U.S.C., Sec. 301, et seq.) are set forth below.

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309(a):

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

"(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

"(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

"(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and the reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire

> the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

STATEMENT OF POINTS

1. The Commission erred in concluding that the adverse effect upon job rights of employees was not a matter within the Commission's jurisdiction when considering whether grant of a transfer application would serve the public interest, convenience and necessity.

2. The Commission erred in concluding that the actions of WPIX, Inc. in refusing to acknowledge NABET's bargaining rights did not contravene national labor policy.

3. The Commission erred in refusing to direct an evidentiary hearing when a prima facie showing of adverse effect of a transaction upon employees was made and no countervailing considerations in the public interest were advanced to support approval of the grant.

SUMMARY OF ARGUMENT

When considering whether grant of a transfer application is consistent with the public interest, convenience and necessity, the Commission must evaluate, as one element of the public interest, the effect of the transaction on the employees involved. The Commission therefore erred in

concluding that the effect of the transaction on the employees involved was not a matter within its jurisdiction.

When the issue of national labor policy is raised in a Commission proceeding, the Commission is not at liberty to follow its own notions of what is fair and proper, but must accommodate its policy to the public policy of this government as it has been authoritatively declared by some competent body. Both the National Labor Relations Board and the Supreme Court in Wiley & Sons v. Livingston, 376 U.S. 543, 11 L. Ed. 2d. 898, 84 S. Ct. 909 (1964) have declared that collective bargaining rights survive a change of ownership of a continuing business entity. Without encroachment upon the jurisdiction of other agencies, the Commission may properly consider whether applicant's ability to serve the public interest, convenience and necessity has been impaired by its failure to observe national labor policy. Its refusal to accept this responsibility in this case is error.

In any event, the Commission is obligated to make the required statutory finding that the public interest, convenience and necessity will be served by granting this application without hearing. It has not done so in this case. Rather it has asserted that adverse effect of the transaction on the employees of assignor is not an element of public interest which the Commission must consider and that any violation of national labor policy which might later be determined by some other agency would involve only a reasonable difference in interpretation and would not reflect on the character qualifications of an applicant. If the Commission is to disregard employee interests and national labor policy, it must at least advance some countervailing considerations to support a finding that the public interest will be served. Failure to do so here requires a

direction that an evidentiary hearing be held to develop the public interest problems which may be involved.

ARGUMENT

I. Where a prima facie showing of adverse effect of a proposed transaction on the employees involved has been made, the Commission must consider this effect as one element to evaluate in determining whether a grant will serve the public interest, convenience and necessity.

The Commission's decision totally misconstrues our argument in this case as one which seeks to have the Commission adjudicate rights in a private controversy. Thus in its opinion it states that the issue of continuing job rights by the six technical employees of WBFM "is not a matter within the Commission's jurisdiction" and that "such claims must be brought in the appropriate forum, be it the civil courts or before the NLRB." (R.185)

But we not only have not asked the Commission to adjudicate any such private claims--we would be the first to insist that the Commission has no authority to make such an adjudication. It clearly is not the proper forum for interpreting our collective bargaining agreements or arbitrating our rights against the principals in the present transaction. What we have sought under the Commission's own statutory standards is a determination of whether the public interest will be served by a transaction which extinguishes the employment rights and opportunities of skilled television personnel.

Sec. 309(a) of the Communications Act requires the Commission to determine, in cases of this type, whether, "upon examination of such application and upon consideration of such other matters as the Commission may officially notice," a grant of the application would serve the "public interest, convenience and necessity." Secs. 309(d) and (e) of the statute permit the

Commission to grant a transfer application without hearing only if it can find that on the pleadings and representations made to it there are no substantial and material questions of fact and the grant will meet the public interest standard. If a substantial and material question of fact exists, or if the pleadings and representations do not make clear that the grant would meet the public interest standard, then the Commission is required to designate the application for hearing.

In the present case the substantial and material facts appear to be admitted. The buyer flatly states that it does not plan to hire any of the employees who will be displaced by approval of the transfer of license and will not honor the terms of a collective bargaining agreement between the buyer and NABET which will not expire until November 6, 1964. (R.111) Since the facts are not seriously in dispute, the only question that remains is whether extinguishment of bargaining rights and jobs is one element of the public interest which the Commission must consider in deciding whether grant of an application will meet its own statutory public interest standard. This question, we submit, the Commission must answer regardless of whether NABET or the employees have remedies in other forums. Conduct otherwise legal may yet be so inconsistent with the concept of public interest in an FCC proceeding as to require denial of the subject applications or at least an evidentiary hearing to explore the factual issues.

As this Court pointed out in Granik & Cook v. FCC, 98 App. D.C. 247, 234 F. 2d 682, "Good faith and fair dealing bear upon the public interest even though their private interest, considered alone, is not for Commission determination." The Commission has acknowledged this principle in many cases not involving labor unions or station employees. For example, in Bay Radio, Inc., 14 Pike & Fischer RR 715, the licensee probably did nothing

illegal when he offered stock to listeners for the purpose of enabling him to continue a good music program format and subsequently assigned the stock of the corporation to another corporation which intended to use a different programming format, but the conduct complained of was held to create an issue of qualifications; i.e., good faith and fair dealing. Similarly the broadcast prescriptions of "goat gland" Dr. Brinkley and the envenomed anti-Semitic diatribes of the Reverend Shuler may not have violated any law or even have given rise to any civil cause of action in any forum, but the Commission considered the conduct involved so reprehensible as to warrant license revocations. See KFKB Broadcasting Co. v. F.C.C.,60 App. D.C. 79, 47 F. 2d 670 and Trinity Methodist Church South v. F.C.C., 61 App. D.C. 311, 62 F. 2d 850.

Certainly the idea that the effect upon employees of a financial transaction subject to regulatory approval is one element among the complex criteria by which the public interest is evaluated and balanced, is not a novel one in American administrative law. Indeed, so far as our research has been able to discover the Federal Communications Commission is the only federal administrative agency armed with statutory authority to approve transfer of governmentally bestowed operating rights which has not consistently held that the impact of such transactions on the employees involved is an important element of the public interest.

For example, long before the present Section 5(2)(f) of the Interstate Commerce Act, an amendment adopted in 1940 (54 Stat. 906, 49 U.S.C. Sec. 5 (2)(f)),required that the Interstate Commerce Commission in passing upon any application to transfer operating rights must provide a "fair and equitable arrangement to protect the interests of the employees affected" by a proposed transaction, the Interstate Commerce Commission did exactly that

because in its view the public interest required such consideration. In St. Paul Bridge & Terminal Railway Co. - Control, 199 I.C.C. 588, 595, the Interstate Commerce Commission said:

> "....There is no definition here (Sec. 5(a)(3)) of the public interest. The language is broad enough to include every public interest and the interest of every group or element of the public. Certainly, it embraces the whole public and the interest of the public as a whole. Since employees of railway companies are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management ownership and operation of the companies by which they are employed is manifest. It is likewise manifest that theirs is a public as well as a private interest. It is our view that in appropriate cases and where the record before us shows the need based upon considerations of public interest in the broad sense, we may make our findings approving applications under Section 5(4) of the Act subject to just and reasonable requirements imposed in the interests of employees of the railways concerned."

In the same case at page 596 the Commission ruled:

> "The welfare of the employees affected by this proposal is unquestionably one of the matters of public interest which we have to consider. As we view the present case, no one should, of necessity, be deprived of employment or be in a worse position with respect to his compensation because of the applicant's control of the terminal."

The Commission then proceeded to attach conditions regarding seniority, tenure, sick fund, salaries, etc.*/

The Civil Aeronautics Act, as amended, 72 Stat. 754, 49 U.S.C.A. Sec. 1371(h) is less specific than the present Secs. 5(2)(c) and (f) of the Interstate Commerce Act and provides simply that "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest." Under the authority of this Section and Sec. 1378

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*/ See also U.S. v. Lowden, 308 U.S. 225, 84 L. Ed. 208, where similar conditions were approved prior to enactment of the Transportation Act of 1940.

the Civil Aeronautics Board has consistently required that applicants for acquisition of control satisfy the Board that the interests of the carrier employees will not be adversely affected. Thus, in United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701, 707 (1950), the Board said:

> "Subsection (b) of section 408 confers upon us express authority to attach to our approval of a transaction, subject to provisions, such terms and conditions as we shall find to be just and reasonable, and also to prescribe modifications of the transaction. The Board has no express authority to impose conditions in passing upon the transfer of a certificate under section 401(i). But it would seem clear that the power of the Board to approve or disapprove a certificate transfer includes the power to grant approval contingent upon compliance with specified conditions. The short answer to any challenge to the Board's power to impose conditions in a certificate transfer case is that by imposing conditions the Board finds that without them the transfer is not consistent with the public interest and should be disapproved. Hence, the imposition of conditions does no more than give the parties to a certificate transfer an opportunity to modify the basis of their transaction, and thereby to avoid the order of disapproval which the Board would otherwise be compelled to issue. Air Cargo, Inc., Agreement, Petitions, 9 C.A.B. 468 (1948)
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> "Any doubts as to whether the general authority under sections 401(i) and 408(b) to attach conditions to an order of approval issued thereunder includes the power to impose conditions for the benefit of adversely affected employees are set at rest by three decisions of the Supreme Court. United States v. Lowden, 308 US 225; ICC v. Railway Labor Assn, 315 US 373 (1942); Railway Labor Association v. U.S., 339 US 142 (1950). For present purposes, the net of these decisions is that, although the Board need not impose conditions for the benefit of adversely affected employees in cases involving route transfers, acquisitions, and mergers, it may do so in its discretion." (Emphasis supplied)

See also Delta-Chicago & Southern - Merger, 16 C.A.B. 647 (1952) and United Air Lines - Control - Capital Air Lines, 33 C.A.B. 307 (1961), Docket No. 11699.

The Courts have upheld the Civil Aeronautics Board's view that it has the power to impose labor protective conditions. In Kent v. C.A.B., 204 F.

2d 263 (CA 2, 1953), where much the same argument was made as Intervenors make here, the Court, after saying it had no doubt about the power of the Board to impose such conditions, went on to add:

> "It is nevertheless contended that the orders are invalid because they are in conflict with collective bargaining agreements in effect when they were made between PAA and the union bargaining agent of its employees. This contract established the seniority rights of such employees on the sole basis of their respective length of service with PAA, with certain exceptions not here pertinent, and it is urged that under the contract all of the AOA employees would have to be placed on the list below the lowest ranking employee of PAA at the time of merger, in complete disregard of their period of service with AOA. Assuming arguendo that this interpretation of the contract is correct, we are of the opinion that the orders are not invalid for that reason. A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest. National Licorice Company v. N.L.R.B., 309 U.S. 350; 60 S. Ct. 569, 84 L. Ed. 799; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230; National Broadcasting Co. v. U.S., 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344."

See also Western Air Lines v. C.A.B., 194 F. 2d 211 (CA 9, 1952) where the Court said that it was "not open to doubt that the Board has power to condition its approval by the imposition of terms bearing some just relation to the public interest," and cited with approval U.S. v. Lowden, supra, an Interstate Commerce Commission case in which the Supreme Court held that such power existed notwithstanding the absence of express statutory authority.

Indeed, the Federal Communications Commission has itself held in a transfer case that the proposed retention of personnel of the selling station was an affirmative factor supporting a grant of the application as in the public interest. See the Seitz case, 7 F.C.C. 315, 318 (1939) where the

Commission stressed that "The present manager, radio operators, and technicians now employed at the station will be retained on a regular basis." The basic criteria for judgment and preference in comparative cases have always included such factors as "carefulness of operational planning for television" and "staffing." See letter from Chairman of Commission, August 30, 1956 to Chairman of Senate Interstate and Foreign Commerce Committee, U. S. Senate, Hearings on S. Res. 13 and 163, 84 Cong., 2d Session (1956) pp. 979-981. If carefulness of operational planning and staffing are important factors in comparative cases, they should be considered at least equally important in Section 310(b) cases where the statutory standard for approval is identical; i.e., whether a grant of the application will serve "the public interest, convenience and necessity."

It seems to us especially paradoxical that the very facts which give NABET standing as a party in interest under Section 309(d)(1) of the Act (that is, threat to jobs and collective bargaining rights) are thereafter held to be beyond the jurisdiction of the Commission to consider under the public interest standard. Inherent in the "party in interest" concept is that the party seeking such status can be "aggrieved" by an agency decision and thus his claim of injury must at least be examined. See National Coal Association v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F. 2d 649 (App. D.C.); American Communications Association v. United States, 298 F. 2d 649 (CA 2); Associated Industries v. Ickes, 134 F. 2d 694 (CA 2).*/ In the present case the Commission concedes, in the words of its decision in Transcontinent Television Corporation, 21 Pike & Fischer RR 945 (1961) that

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*/ National Coal has been cited with approval by this Court in an FCC case: Clarksburg Pub. Co. v. F.C.C., 96 App. D.C. 211, 225 F. 2d 511, 514, n. 8.

that the loss of job and bargaining rights by reason of the assignee's refusal to assume a labor contract creates a sufficiently "tangible, substantial and particular interest" to give petitioner standing as a party in interest, and then nullifies its own concession by asserting that the very interests which confer standing are beyond its jurisdiction in determining whether grant of the applications will be consistent with the public interest, convenience and necessity. If there is no jurisdiction, there should be no standing.

In short, the adverse effect of a proposed transaction upon employees is not solely a private effect; it is a private effect inextricably related to the public interest. Under other regulatory statutes the administrative agencies and the courts have so held. It can hardly be said to be demonstrative of good faith and fair dealing to carefully dispose of the property rights and interests and commercial contract obligations of the selling licensee and deliberately ignore the human rights of the employees themselves who make it possible for the stations to provide any service to the public. The public interest is not served by carefully guaranteeing property rights and commercial contracts with one stroke of the pen and then ignoring and abrogating employee rights and labor contracts with the next stroke. Such conduct does not reflect an applicant's disposition to operate a broadcast station in the public interest.

II. The refusal of the buyer, WPIX, Inc., to assume the collective bargaining contract between NABET and the seller contravenes national labor policies and is prima facie inconsistent with the public interest.

By letter of January 20, 1964 NABET notified WPIX, Inc., the prospective

buyer of the WBFM license, that it had a collective bargaining agreement with WBFM for a term ending November 6, 1964 and asked whether the buyer would accept the terms and conditions of this Agreement. (R.110) The buyer replied on January 31, 1964 that its "projected purchase of WBFM includes only certain assets" and that "Personnel and contracts are not included in the understanding." It added that "it is our expectation that we will not have need for additional technical personnel inasmuch as we already have a substantial staff in connection with our television station." (R.111)

In an affidavit accompanying the Opposition of WPIX, Inc. to NABET's petition to deny the applications, the Vice-President in Charge of Operations of WPIX, L. J. Pope, said that he informed the seller at the time of the sale negotiations that WPIX "would not agree to take over their employees or their union contract, but had to leave open for future determination the question of the designation of the specific employees who would operate the station." (R. 136) In explaining his position Pope said that,

> "While WPIX is a television station and we now have no radio broadcast operation, it is by no means inconceivable that Local 1212 (an incumbent IBEW union at the television station) would claim jurisdiction over the WBFM operation under the terms of the existing contract." (R. 137)

He added that "It goes without saying that WPIX, Inc. bears no hostility towards unions in general, nor toward NABET in particular." (R. 138)

On the basis of these facts the Commission concluded that WPIX, Inc.'s position neither violated nor demonstrated a disposition to ignore national labor policy. (R. 186) Then it added the gratuitous observation that even if appropriate authorities later determined that WPIX's actions constituted an unfair labor practice "it would appear to be a conclusion reached from a reasonable difference in interpretation and not one reflecting on the character qualification of the assignee." (R.186) In effect the Commission is

saying that it is unimportant under its statute whether an application violates or shows a disposition to violate national labor policy. With respect to NABET's argument that Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, stands for the proposition that a new owner of a continuing business enterprise is bound by the collective bargaining agreement between the old owner and the union representing the employees, whether or not there is any "successor" clause in the agreement and whether or not the owner had agreed to assume the obligations of the agreement, the Commission's only comment was that it had considered the Wiley case carefully and had concluded that "it is not applicable to the facts of the subject dispute." (R. 186)

We submit that WPIX's blunt refusal to assume any obligations whatsoever under NABET's collective bargaining agreement was in direct contravention of national labor policy. As Federal Communications Commission Commissioner Loevinger said in his dissenting opinion in Rockford Broadcasters, Incorporated, 1 Pike & Fischer RR 2d 405 (1963) (where almost precisely the same issues were involved as here):

> "The issue of employer-employee relations having been raised in this proceeding, the Commission is not at liberty to follow its own notions of what is fair or proper, but is authorized only to apply the public policy of this government as it has been authoritatively declared by some competent body."

The public policy of this government, as it has been fully and explicitly stated by Congress in the Labor Management Relations Act, 1947, 61 Stat. 136, 29 USC, Sec. 151, is to encourage the practice and procedure of collective bargaining. For the latest authoritative exposition of this policy by the Supreme Court we turn to the Wiley case, supra. The direct holding of Wiley is that where a unionized employer merges with a nonunion employer, the

survivor has an obligation to arbitrate the grievances of the unionized employees in accordance with the terms of the premerger labor contract. But in its opinion the Supreme Court went much farther. It stressed that where there is a "substantial continuity of identity in the business community" and a "relevant similarity and continuity of operation across the change in ownership," the successor employer acquires a going concern and the labor code governing this living industrial community survives the transfer of ownership. In other words, a labor contract is not subject to ordinary common law rules applicable to commercial contracts; it is a code of laws for the government of a particular industrial community, and like an international treaty it survives a change in administrations.

We ask then, why should not the Wiley case reasoning be applicable here? The buyer concedes that it has no present radio station operation so that clearly the WBFM "industrial community" or radio enterprise will survive the change of ownership. (R.137) Does the fact that Wiley was a merger case whereas the present case involves an outright sale alter the principle? The Court of Appeals for the Ninth Circuit does not think so. In Wackenhut Corp. v. Plant Guards, 332 F. 2d 954 (CA 9, 1964) the Court considered this suggested distinction in a sale case and concluded that the Supreme Court did not rest its decision on that narrow ground, "but upon a broader view dictated by the policy of the national labor laws." The Court said:

> "What the Supreme Court did in Wiley was to balance the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the

> court held the described interest of the employees outweighs that of the employer, and must prevail."

May a valid distinction between Wiley and this case be made on the ground that in Wiley the new owner's employees were not unionized whereas here WPIX, Inc. already has collective bargaining contracts with unions representing its television employees? We submit the answer must be no. Whether the new owner's television employees are unionized or nonunionized, the industrial community which was a radio station continues intact except under new ownership. It is true that one of the incumbent unions representing television employees may claim jurisdiction over the radio operations, but this is a question which can only be raised at the expiration of the current collective bargaining agreement with NABET and necessarily involves unit determinations by the National Labor Relations Board and an election. */

If we accept Wiley as establishing national labor policy in a case of this type, as we think we must, then the conclusion is inescapable that by refusing even to deal with NABET the buyer has violated national labor policy. But the Commission holds that even if WPIX, Inc. has violated national labor policy, its violation would appear to be the result of a "conclusion reached from a reasonable difference in interpretation and not one reflecting on the character qualifications of the assignee." (R.186) Such a holding is clearly inconsistent with the decisions of this Court.

It is uncontestable that the Commission has authority to examine the practices of an applicant with respect to matters other than engineering and program aspects of communications, and may properly consider such

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*/ In a C.A.B. context, see Kent v. C.A.B., supra, pp. 15-16, for one Circuit Court's reaction to this type of argument.

matters in determining public interest, convenience and necessity. National Broadcasting Co. v. U.S., supra; Metropolitan Television Co. v. FCC, 110 App. D.C. 133, 309 F. 2d 874 (1961); Mester v. U.S., 70 FS 118, (DC, NY 1947) affd. 332 U.S. 749, rehearing den. 332 U.S. 820; Mansfield Journal Co. v. FCC, 86 App. D.C. 102, 180 F. 2d 28 (1950). In the Mansfield case the issue was presented whether the Commission had properly refused to grant a license to a newspaper on grounds that the newspaper had attempted to suppress competition in advertising and news dissemination. This Court held there was no issue for the Commission to decide as to whether the newspaper had been guilty of violating the anti-trust laws, but that regardless of whether or not the activities amounted to a positive violation of law, they still could impair the applicant's ability to serve the public and were therefore relevant in determining whether the applicant should be permitted to become a licensee.

As Commissioner Loevinger said in his Rockford dissent:

> "In considering the policy of laws other than the Communications Act the Commission is not engaged in the enforcement of those laws, but rather in applying the broad concept of public interest and in maintaining a proper respect for the public policy of the United States as expressed in its statutes."

Specifically, the Supreme Court has admonished other administrative agencies that "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." Southern Steamship Co. v. NLRB, 316 U.S. 31 at 47, 86 L. Ed. 1246, 62 S. Ct. 886 (1942). In Burlington Truck Lines v. United States, 371 U.S. 156, 9 L. Ed. 2d 207, 83 S. Ct. 39 (1962) the Supreme Court warned the Interstate Commerce Commission that it

must be particularly careful to consider the effects of its decisions on the functioning of national labor policy, especially where its actions "may have important consequences upon the collective bargaining processes between the union and the employer." It stressed that "The policies of the Interstate Commerce Act and the National Labor Relations Act necessarily must be accommodated, one to the other."

We repeat that we have never requested or expected the Federal Communications Commission to adjudicate matters within the jurisdiction of the National Labor Relations Board. But in the very nature of a transfer proceeding there can be no National Labor Relations Board adjudication until after the transaction has been consummated. NABET cannot file charges against a non-employer. Consequently the question which was before the Commission in these proceedings was never whether the National Labor Relations Act had been violated or an unfair labor practice committed, but was instead whether the proposed buyer had shown a disposition to ignore national labor policy to encourage collective bargaining. If the Federal Communications Commission may make such a finding in an anti-trust context, we see no logical reason why it should not be required to make such a finding in an employer-employee context.

III. Where a prima facie showing of adverse effect of a proposed transaction on the employees involved has been made and where the buyer's refusal to assume the collective bargaining contract contravenes national labor policy, the failure of the Commission to advance any countervailing considerations of public interest to support a grant without hearing is error.

Nowhere in the Commission's Opinion is the required finding made that the public interest, convenience and necessity will, in fact, be served by

granting the application without hearing. Its Opinion is limited entirely to a consideration of some of the arguments submitted by NABET and the denial of NABET's petition. Moreover, the Opinion never even mentions the argument repeatedly urged by NABET that where economic injury to employees exists and a prima facie showing is made of disposition to ignore national labor policy, a hearing must be ordered unless some countervailing considerations of the public interest are advanced which grant of the application would serve.

It is wholly conceivable to us that in a proper case the Commission could conclude that even though an application would adversely affect employees and an applicant had failed to observe national labor policies, these negative public interest factors when weighed in the balance were offset by other positive public interest factors indicating that improved service to the public would flow from approval of the proposed transaction. But in the application itself and the accompanying exhibits neither the buyer nor the seller advances any such countervailing positive considerations for evaluation by the Commission other than the seller's unadorned and casual statement that it desires to sell so that it can concentrate its energies on its other business endeavors. (R.4)

The statute plainly states that if any substantial and material question of fact is presented, or if the pleadings and representations do not make clear that the grant would meet the public interest standard, then the Commission is required to designate the application for hearing. 47 U.S.C. Sec. 309(d)(e). We believe that NABET has carried its burden of making a showing that a grant of the application would be "prima facie inconsistent with subsection (a)" (Sec. 309 (d)(1)),but the question is not whether NABET has borne the burden of showing the applicant-assignee is a law breaker or

is disqualified from becoming a licensee, but whether the assignee has borne the burden of showing that it is qualified and that the public interest will be served by summarily granting the application for assignment of the license. On the record before it at the time of its decision, the Commission simply could not and in fact did not make such a finding. Since the Commission could not and did not make such a finding, we submit the statute requires the Commission to designate this proceeding for hearing.

CONCLUSION

Appellant submits that the Memorandum Opinion and Order of the Federal Communications Commission released July 20, 1964 should be set aside and the matter should be remanded to the Commission with directions to designate the applications for hearing.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,879

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee,

WEATHER CORPORATION,
WCAX, Inc.,
Intervenors.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION.

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STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on October 5, 1964, are as follows:

1. Whether the Commission acted erroneously in granting without hearing the application for assignment of the license of Station WBFM despite appellant's contention that the assignment would adversely affect the future job rights of the station's employees.

2. Whether the Commission acted erroneously in determining without hearing, that WPIX, Inc., the proposed assignee of the WBFM licensee, was qualified to be a licensee of the Commission notwithstanding appellant's contentions that assignee has ignored appellant's bargaining rights and that such actions contravene national labor policy.

3. Whether the Commission acted erroneously in determining, without hearing, that a grant of the assignment application would be consistent with the public interest, convenience and necessity.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,849

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
AND TECHNICIANS, AFL-CIO,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WRATHER CORPORATION,
WPIX, INC.,
Intervenors.

ON APPEAL FROM A MEMORANDUM OPINION
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION.

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(6), and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, from a Memorandum Opinion and Order of the Federal Communications Commission adopted July 15, 1964, and released July 20, 1964 (R. 182-186). The order (1) granted the application filed by Wrather Corporation (Wrather) for the assignment of licensee of radio station WBFM (FM), New York, New York, to WPIX, Inc., (WPIX)[1/] and (2)

1/ WPIX, the assignee, is the licensee of television station WPIX, New York, operating on Channel 11, and does not own any other AM or FM broadcast stations.

denied the National Association of Broadcast Employees and Technicians', AFL-CIO (NABET) "Petition to Deny Application or, in the Alternative, to Designate for Hearing." The relevant background facts are as follows:

On January 15, 1964, Wrather, the assignor -- licensee of WBFM, and the assignee, WPIX, filed an application requesting the Commission's approval for the assignment of the license of WBFM to WPIX for the sum of $400,000 (R. 1-98). The parties indicated inter alia, that all of the executives and staff of WPIX would be responsible for the operation of WBFM and that approximately eight additional persons would be hired for exclusive work on WBFM (R. 18). Also, the underlying contractual agreement stated that except as was set forth in another provision of the contract relating to advertising and program production agreements, WPIX would not be required to employ or otherwise incur liability to any person employed by Wrather, whether in the operation of the station or otherwise (R. 53).[2/]

NABET filed a petition to deny this application on February 18, 1964 (R. 99-111). NABET is a labor organization representing engineers, technicians, and other employees in the broadcasting industry. Since November, 1961, it has engaged in collective bargaining with Wrather, pursuant to certification by the National Labor Relations

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2/ Appellant's statement on p. 3 of its Brief that the buyer (WPIX) was to purchase all assets including "contracts and agreements existing at time of sale and program production agreements 'to the extent that they are assignable' " is somewhat misleading. In fact, the contracts and agreements which WPIX obligated itself to were specifically contracts and agreements relating to the sale of station broadcast time, and not contracts in general, as appellant seemingly indicates (R. 52).

Board (N.L.R.B.), to establish the wages, hours, and working conditions of employees of WBFM in an appropriate bargaining unit of approximately six employees classified as operators and operator-engineers (R. 99-100). A collective bargaining agreement between NABET and Wrather expired on November 6, 1964 (R. 100).

Two letters, forming the factual basis of NABET's claim for relief, were attached to its pleading (R. 110-111). One, written on January 20, 1964, by NABET's Regional Representative in New York City, to the Executive Vice-President of WPIX, called his attention to the collective bargaining agreement between NABET and Wrather, and inquired whether WPIX would continue to recognize NABET as the bargaining agent by accepting the terms and conditions of the existing agreement and becoming a party thereto (R. 110). The second, dated January 31, 1964, and signed by the Vice President in Charge of Operations of WPIX, L.J. Pope, replied that the proposed sale of WBFM to WPIX did not include personnel and contracts, and that although no final plans had as yet been made, WPIX did not believe that additional technical personnel would be needed, inasmuch as WPIX already had a substantial staff in connection with its television station (R. 111). However, Mr. Pope's letter also stated that WPIX may wish to consider the qualifications of some of the present WBFM employees should the need arise at a subsequent time.

In its petition to deny, NABET argued that under the public interest standard, the Commission was required to take into account the private "economic injury to the contractual rights and employment" of the six personnel involved. It urged that such factors were

regularly considered by the Interstate Commerce Commission and the Civil Aeronautics Board in their regulation of transportation common carriers, and that the same considerations should apply in the broadcast field (R. 103-105). Secondly, NABET asserted that a grant of the application would be prima facie inconsistent with the public interest, because WPIX's alleged refusal to recognize NABET's bargaining rights contravened national labor policy. "On this question" its petition asserts "NABET relies entirely on. . . Commissioner Loevinger['s]. . .dissent in Rockford Broadcasters, Inc., 1 Pike & Fischer, R.R. 2d 405." In opposing the NABET petition Wrather and WPIX argued (1) that claim of loss of jobs was premature since WPIX had indicated that it might hire some of the stations employees when its plans were clear; (2) that private economic injury to individuals was not an aspect of the public interest in broadcasting, a field characterized by free competition; (3) that the Commission was not the proper forum to adjudicate job tenure and other employment rights; and (4) that there was no evidence that the assignee (WPIX) was attempting to contravene national labor policy with regard to collective bargaining and the right to organize, since WPIX's own technical employees had been organized years ago as members of a NABET rival, the International Brotherhood of Electrical Workers (IBEW). (R. 122-140).

Attached to WPIX's Opposition was an affidavit from its Vice-President in Charge of Operations, L.J. Pope (R. 136-139), stating that he had informed NABET that the station could not agree to take over Wrather's employees or union contract, but that it

would leave open for future determination the question of what employees would operate the station (R. 136). The stated reason for this was that WPIX had a long-standing collective bargaining agreement with a local of the IBEW which provided that this union's jurisdiction extended to all employees engaged in "radio broadcast" operations, and since NABET and IBEW were rival unions, WPIX did not wish to become involved in a jurisdictional dispute between the two (R. 137). The affidavit also made clear that NABET did not specifically ask WPIX to recognize it as NABET claims, but only whether WPIX would agree to become a party to the existing contract with Wrather which WPIX declined to do (R. 137). Mr. Pope also indicated that WPIX bore no hostility towards unions nor NABET in general, and that at the present time, WPIX had collective bargaining agreements with six separate unions representing different classes and groups of its employees. In conclusion, Mr. Pope indicated that WPIX was unwilling to assume any long-term commitments of any nature, since to do so could possibly prevent WPIX from putting into effect program policies and commercial practices which it believed would best serve the public interest (R. 138-139). Wrather's pleading made essentially the same arguments as those put forth by WPIX (R. 112-120).

On May 19, 1964, while its petition to deny was still pending, NABET filed a supplemental pleading citing a recent Supreme Court case which, NABET contended, required WPIX to become a party to the collective bargaining agreement between NABET and Wrather. According to NABET, WPIX's failure to state in advance of the grant

that it would become a party, was in violation of national labor policy and thus reflected on WPIX's qualifications as a broadcast licensee. (R. 156-158).

Both Wrather and WPIX filed oppositions (R. 160-171), contending that the decision was misconstrued by NABET. They pointed out that the case involved the merger of a unionized corporation into a non-unionized corporation and that the consideration relied on by the Court had no relevance here where both the assignors and the assignee were already parties to collective bargaining contracts, albeit with different unions. (R. 161-163). The Court decision they pointed out, expressly distinguished this situation from the one presented by Wiley. See John Wiley & Sons v. Livingston, 376 U.S. 551-552 (1964).

By a Memorandum Opinion and Order released on July 20, 1964, the Commission determined that while NABET was a party in interest in this proceeding, it had nevertheless failed to allege any matter demonstrating that a grant of the Wrather - WPIX assignment application would be contrary to the public interest (R. 185).[3/]

The Commission believed that NABET's objections to a grant of the application focused on two principal issues:

> (1) [W]hether an assignment which may result in the loss of jobs by employees of the station currently represented by NABET under a contract expiring November 6, 1964 is in the public interest; and (2) whether the refusal of WPIX, Inc. to assume the contract between NABET and the assignors employees (even though it intends to continue its collective

3/ The Commission's action was by a 5-2 vote. However, Commissioner Loevinger, whose dissent in the Rockford case supra, is admittedly a major basis for NABET's claim that WPIX's behavior raises serious public interest questions, voted with the majority here.

> bargaining relation with another union) contravenes national labor policies and is prima facie inconsistent with the public interest (R. 185).

The Commission concluded that the claim of continuing job rights of the six employees of WBFM was not a matter within its jurisdiction, and that such claims must be brought in the appropriate forum, whether it be the civil courts or the NLRB. In addition, the Commission held that WPIX had not violated nor demonstrated any disposition to ignore national labor policy (R. 186). It found that WPIX's pleading contained uncontroverted facts concerning the existence of WPIX's present collective bargaining agreements and its intentions not to deny union representation to any future employees of WBFM. Furthermore, the Commission pointed out that if appropriate authorities determined that WPIX's actions constituted unfair labor practices this conclusion would be reached from a reasonably difference of interpretation of the facts, and not one reflecting on the character qualification of WPIX. Finally, the Commission held that the John Wiley & Sons case was not applicable to this proceeding. (R. 186).

SUMMARY OF ARGUMENT

I.

The Commission was not required to consider the effect of the assignment on the job rights of the six technical employees of WBFM in its determination of whether the grant was in the public interest. The cases relied upon by appellant have no application in this case because there is a difference between air and land common carriers and radio broadcast stations with respect to the nature and extent of federal regulation. In the common carrier field, free competition which is characteristic of the broadcasting field, has given way to a degree of substituted governmental control of entry, rates, and cessation of business. Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 92 (1953).

Congress has also imposed specific conditions for employee protection in connection with consolidations of land and air common carriers, and telegraph common carriers. "In contradistinction . . .the [Communications] Act recognizes that broadcasters are not common carriers, and are not to be dealt with as such." Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940); cf. United States v. R.C.A., 358 U.S. 334, 348-352 (1959). The Commission is given no supervisory control of a licensee's programs, or business management, or policy. Yet control of business management is precisely what appellant urges here. Consideration of employee job rights in connection with changes in the development of common carrier industries is directly related to the

basic decision of Congress that common carriers be closely regulated as unified systems in which the nation is especially interested. No such policy has ever been indicated with regard to broadcast stations, and it is not enough for appellant to rely solely on these dissimilar common carrier cases.

Appellant has made no showing in its pleadings as to the effect of the assignment on the operation of WBFM or the public interest. Absent any showing or some wider effect, the Commission properly refused to make the assignment the occasion for the resolution of conflicting private interests.

II.

The Commission properly determined that NABET failed to allege any facts showing that WPIX had engaged in conduct at odds with national labor policy, or that a grant of the assignment application would be inconsistent with the public interest. Appellant's major reliance on John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543 (1964), is misplaced. The Supreme Court pointed out in that case, that it was not extending its ruling to cover the situation presented in this case, where there is a conflict with another union with which the purchaser already had a collective bargaining agreement.

Where a merger of business involves a conflict between the seller's and purchaser's respective unions, the determination of which bargaining unit survives, and which union or unions will represent the employees, devolves upon the National Labor Relations

Board. L.B. Spear and Co., 106 N.L.R.B. 687 (1953). WPIX's refusal to agree in advance to assume the collective bargaining agreement previously made between Wrather and NABET did not evidence any bad faith. Appellant has not even attempted to show that WPIX's unwillingness to assume the bargaining agreement was the kind of reprehensible conduct which the Commission could consider as reflecting upon the character qualifications of the assignee. Therefore, the Commission properly denied NABET's request that the assignment application be designated for an evidentiary hearing.

ARGUMENT

I. THE EFFECT OF THE ASSIGNMENT ON SIX TECHNICAL EMPLOYEES OF THE STATION WAS NOT A FACTOR THE COMMISSION WAS REQUIRED TO CONSIDER.

Appellant contends (Br. 11-18) that the Commission erroneously refused to consider as part of the public interest in the assignment of the license of station WBFM the likelihood that six technical employees of the station would not be retained by the new owner. Appellant mistakenly relies, we believe, upon policy in common carrier fields which is inappropriate here, at least in the absence of a specific Congressional directive.

It is true, as appellant points out, that both the Interstate Commerce Commission and the Civil Aeronautics Board have been held to have the power to consider employee interests in consolidation and acquisition situations, and to attach protective conditions to agency approval of such proposals. It is also true that the "public interest, convenience and necessity" standard made applicable to assignments of licenses by Section 310(b) of the Communications Act, 47 U.S.C. 310(b),[4/] is not in terms different from the standard governing transfers of certificates subject to

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4/ Section 310(b) provides that the grant of an application for the voluntary assignment of a license to operate a radio station shall be made if the Commission finds that the public interest, convenience and necessity will be served thereby. This standard is similar to that governing the initial grant of a license. Section 309, 47 U.S.C. 309. Since Section 310(b) provides that the procedure on an assignment application shall be the same as on an application for an original license, the various provisions of Section 309(d), 47 U.S.C. 309(d), are applicable, and the Commission may summarily grant an application only if it finds that upon the pleadings and affidavits before it, there are no substantial and material questions of fact, and the grant would meet the public interest standard. If any substantial and

(cont'd)

Civil Aeronautics Board approval. See 49 U.S.C. 1371(h). However, there is a difference between air and land common carriers and radio broadcast stations with respect to the nature and extent of federal regulation, and this difference is crucial to the question raised here.

Common carrier regulation has traditionally been wide in scope and detailed in its depth, encompassing not only a basic authority to operate but also specific supervision of rates, practices, accounting methods, and management. The purpose is to insure a unified system which is both economical and efficient. As a result, free competition has given way to a degree of substituted federal control of entry, rates, and cessation of business. Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 92 (1953); United States v. R.C.A., 358 U.S. 334, 348 (1959).

It is in this context that Congress, the courts, and the regulating agencies have deemed it to be sound policy to consider employee interests, as well as the general interest of the public at large, in certain situations. And the imposition of conditions for the protection of the rights of employees can be fairly and efficiently imposed where additional operating expenses required by the government can be taken into account by the government in approving charges.

Thus, in United States v. Lowden, 308 U.S. 225 (1939),

4/ (cont'd) material question of fact is presented, or if the application and pleadings otherwise do not make clear that the grant would meet the public interest standard, the Commission is then required to designate the application for an evidentiary hearing. 47 U.S.C. 309(d) and (e).

the Supreme Court held, in advance of the enactment of specific legislation, that the Interstate Commerce Commission had authority to require employee compensation in approving the lease of a railroad by one railroad company to another. The Court held that the term "public interest," while limited to the public's interest in an adequate rail transportation system, gave sufficient authority because the particular lease was "not to be viewed as an isolated transaction or apart from the Commission's plan for consolidation of the railroads" (308 U.S. at 232), and because the policy of consolidation of railroads was interwoven with railraod labor relations. The decision noted the imminence of legislation on the subject, and the history of Congressional interest in the safety and welfare of railroad employees. Somewhat later, the Supreme Court ruled the same way with respect to abandonment of lines, in I.C.C. v. Railway Labor Association, 315 U.S. 373 (1942), emphasizing the effects on the national railroad system.

Congress has also gone so far as to impose its own specific conditions for employee protection to a consolidation of the Western Union and Postal Telegraph companies, giving to the courts and the National Labor Relations Board the jurisdiction and power to enforce the rights granted. See Section 222(f) of the Communications Act, 47 U.S.C. 222(f) (57 Stat 5). This type of protection, as noted above, has also been provided by the Civil Aeronautics Board with respect to air carrier employees, in reliance upon United States v. Lowden, and I.C.C. v. Railway Labor Association, supra, and Railway Labor Executives Association v. United States, 339 U.S. 142

(1950).[5] See, e.g., United - Western, Acquisition of Air Carrier Property, 11 C.A.B. 701, 707 (1950).

But all of these decisions and statutory provisions have been in the context of a common carrier field involving both comprehensive federal regulation and a closely interconnected transportation or communications system. The radio broadcast field is substantially different. Congress has specifically provided that, "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier," Section 3(h), 47 U.S.C. 153(h). And, accordingly, the radio broadcasting industry has been regulated in a manner very different from the regulation of communications and other common carriers. Broadcast licensees are free to fix their rates to advertisers, and they are not limited to a fair rate of return on investment. They compete freely. See United States v. R.C.A., 358 U.S. 334, 348-352 (1959), which points out the essential difference that in the broadcast field there is "no pervasive regulatory scheme" going beyond the ability of the parties to a station sale to serve the public.

As a concomitant of the different mode of regulation, and as the Supreme Court noted in Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940), "the Act does not essay to regulate the business of the [broadcast] licensee. The Commission is given no supervisory control of the programs, of business management or of policy."[6] But, supervisory

5/ The latter case construed the legislation pending at the time of decision in the Lowden case, supra.
6/ This is in sharp contrast to Section 218 of the Act, 47 U.S.C. (cont'd)

control of business management is what appellant insists upon here. For the question of the number of employees to be kept by the new owner of a station is a question directly involving business management and its immediate supervision by the Commission.

The federal policy of considering employee job rights in connection with changes in the development of common carrier industries is directly related to the basic decision of Congress that common carriers shall be closely regulated as unified systems in which the nation is peculiarly interested. Employee interests have been deemed to have a special public significance in these fields because of the special relation they have to the national interest in the industries. No such policy has been indicated with respect to FM radio broadcast stations, now numbering approximately 1200,[7/] and thus they have never been treated in a similar fashion. This being so, it was not enough for appellant to refer the Commission to the non-analogous common carrier fields.

6/ (cont'd) 218, applicable to communications common carrier, under which:

> "The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio trans mission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."

7/ See Federal Communications Commission Annual Report for 1963. (cont'd)

Appellant made no effort in its petition to demonstrate (or allege) any effect upon the operation of station WBFM, [8] or the general public's interest in the assignment of the station's license. Instead, it relied solely upon an asserted public policy that the interest of the six employees per se was a public interest factor. This contention was properly rejected by the Commission. In the absence of some showing of a wider effect, the Commission correctly refused to make the assignment the occasion for the resolution of conflicting private interests. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 144-145 (1940); Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 72, 202 F.2d 298 (1952). As this Court stated in Pulitzer Publishing Co. v. Federal Communications Commission, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937):

> "But we have never said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, etc. The use and enjoyment of such facilities the public has the legal right to demand; but its right to the use and enjoyment of the facilities of a privately owned radio station is of a much more limited character.

7/ (cont'd) p. 79. The 1200 figure is for commercial standard broadcast (FM) stations only. There are also approximately 240 education FM stations now in operation.

8/ In Seitz, Macy, Jr., and Macy, 7 F.C.C. 315, 318 (1939) (App. Br. 16-17), the Commission mentioned the retention of employees in terms of the proposed operation, not the interests of the employees themselves.

* * * * *

The licensee of a radio station chooses its own advertisers and its own program, and generally speaking the only requirement for the renewal of its license is that it has not failed to function and will not fail to function in the public interest.

As long as this continues to be the policy of Congress, the term -- public convenience, interest, or necessity -- should not be given such a broad meaning as is applied to it elsewhere in public utility legislation."

II. THE COMMISSION PROPERLY DETERMINED THAT WPIX HAD NOT VIOLATED OR DEMONSTRATED A DISPOSITION TO IGNORE NATIONAL LABOR POLICY.

Appellant contends (Br. 18-24) that the Commission erroneously concluded that WPIX had not violated, or demonstrated a disposition to ignore, national labor policy. Appellant relies upon WPIX's unwillingness to assume NABET's existing collective bargaining contract with Wrather, the assignor. We believe, however, that the Commission was clearly correct in holding (R. 186) that WPIX had not been shown to have engaged in conduct at odds with national labor policy.

It should be noted at the outset that the Commission has not ruled, as appellant may believe (Br. 20), that it has no concern with substantial deviations from fair labor practices, or even that such practices must be adjudicated by some other body before they are ripe for Commission consideration. The Commission has previously stated that it will consider conduct of a proposed assignee in contravention of national policy. See Rockford Broadcasters, Inc., 1 Pike & Fischer, R.R. 2d 405, 413 (1963), rehearing denied, 1 Pike & Fischer, R.R. 2d 999, 1000 (1964). The Commission did rule (R. 186) that no facts had been alleged which tended to show that WPIX had acted improperly. The question, therefore, is not the reach of the Commission's authority, but rather the nature of the facts presented to it.

Appellant principally relies on John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), to support its contention that a purchaser of a business is bound by an existing collective bargaining agreement between the seller and the union representing the seller's employees (Br. 20). The Wiley case stands for the proposition that the rights of employees under a collective bargaining contract are not automatically lost by a merger or sale, and that the successor employer may be required to arbitrate under a pre-existing contract which he had not signed. However, the Supreme Court noted in Wiley, that there was no conflict with another union with which the successor employer already had a collective bargaining agreement, and it stated that it was not ruling on that situation. (376 U.S. at 552, footnote 5.) Appellant fails to face the fact that the situation excluded from the import of the Wiley decision is the situation presented here, and that no bad faith refusal to deal is present in such a situation.

The case referred to by the Supreme Court in Wiley was a Labor Board decision in L.B. Spear & Co., 106 N.L.R.B. 687 (1953). In that case, Spear acquired 92% of the stock of another company, Bauman, which was engaged in a similar enterprise. Both companies kept their corporate identity, but otherwise there was a complete merger and integration of personnel and operations. Each company also had had its own union representation. Spears sought an election upon the basis of a single bargaining unit comprised of the employees of both companies. Bauman's union contended that its contract with Bauman was a bar to the proceeding. The Board rejected this theory,

holding that as a result of the merger, the bargaining unit covered by the former contract between Bauman and its union no longer existed. The Board stated (106 N.L.R.B. at 689):

> "We view the merger of the two corporations as comparable to an entirely new operation. Under these circumstances, we believe that sound and stable labor relations will best be served by allowing the employees in the reconstituted unit to determine for themselves the labor organization which they now desire to represent them."

The Spear case demonstrates that where there are two unions, the determinations as to which bargaining unit survives, and which union or unions will represent the employees, must be made in the light of the pertinent circumstances. As appellant recognizes (Br. 24), these determinations are to be made by the Labor Board, whose duty it is to implement national labor policy. San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959); Garner v. Teamsters Union, 346 U.S. 485, 490-491 (1953).

Spears also demonstrates, we think, that where the successor employer has a collective bargaining contract with one union, and where that union may have a claim to represent all of the employees, there is no bad faith in a refusal to agree in advance to take over the contract previously made with another union. See also N.L.R.B. v. Aluminum Tubular Corporation, 299 F.2d 595, 598-599 (C.A. 2, 1962).

As we have shown in the counterstatement of the case, pp. 1-7, this case involved just such a situation.[9/] Appellant has made no

9/ While the Pope letter also indicated (R. 111) that the new owner might not retain the services of the six employees represented by NABET, NABET does not claim that a failure to retain them violates good labor policy. It does argue that their dismissal is per se contrary to the public interest, a contention we discussed in Point I, supra.

attempt to show that a refusal to take over a collective bargaining agreement in such a situation constitutes the sort of reprehensible conduct which the Commission could properly take into account as reflecting upon the qualifications of the assignee. 10/

NABET relies heavily on the dissenting opinion of Commissioner Loevinger in Rockford Broadcasters, Inc., 1 Pike & Fischer, R.R. 2d 405 (1963). Commissioner Loevinger dissented in Rockford because of his belief that the assignee, on the facts of that case, had demonstrated an unwillingness to engage in good faith collective bargaining. Whether Commissioner Loevinger was right in the Rockford case or not is irrelevant here, since the case the Commissioner believed had been presented there has clearly not been presented here. And, that Commissioner Loevinger did not find the two alike, is clear from his approval of the assignment application here. The short answer to this argument is that appellant cannot demonstrate the existence of improper conduct in one set of circumstances from an opinion in another case finding impropriety in a different set of circumstances.

Appellant failed to present to the Commission any conduct on the part of WPIX which tended to show that a grant might not be consistent with the public interest, and its request that

10/ The uncontested affidavit of Mr. Pope (R. 136-139) stated that NABET had sought to represent WPIX's technical employees in 1948 when WPIX began its television operation, but that the National Labor Relations Board had certified the IBEW, which still represents WPIX's employees. Pope also stated that WPIX presently has collective bargaining agreements with six separate unions representing different classes and groups of WPIX's employees.

the assignment application be designated for hearing was therefore properly denied. 11/

CONCLUSION

For the foregoing reasons, the Commissions Opinion and Order should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D.C. 20554

November 13, 1964

11/ The case of Wackenhut Corp. v. International U., United Plant Guard W., 332 F.2d 954 (C.A. 9, 1964) which NABET also relies on, is clearly distinguishable on its facts. The Wackenhut case stands for the proposition that an employers duty to recognize an existing labor contract survives where a corporation purchases the business of a limited partnership and accepts the entire working staff of the partnership on the same conditions contained in the prior labor contract. But in Wackenhut, there was no indication that the corporate purchaser was a union employer. Therefore, the Court decided that case on the basis of the Wiley decision, supra.

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,849

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WRATHER CORPORATION,
WPIX, INC.,
Intervenors.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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INTRODUCTORY STATEMENT

In appellant NABET's original brief in this case three issues were argued: (1) whether adverse effect of a proposed transfer of license on the future job rights of the assignor's employees was a factor which the Commission must consider in approving the transfer as consistent with the public interest; (2) whether assignee was qualified to be a licensee of a broadcast station in view of its refusal to acknowledge NABET's bargaining rights; and (3) whether the Commission erred in granting the application without hearing and without any affirmative finding that under all the circumstances a grant would be consistent with the public interest, convenience and necessity.

Appellee Commission's brief answers the "job rights" issue at pages 11 to 18. It answers the "labor policy" issue at pages 18 to 22. It does not deal with the argument that it was error to grant the application without evidentiary hearing and without a specific finding that other facts made grant of the application consistent with the public interest, convenience and necessity.

Intervenors WPIX, Inc. and Wrather Corporation's brief deal with the "job rights" and "labor policy" issues in much the same manner as the Commission's brief, but both Intervenors' briefs defend the adequacy of the Commission's findings and assert further that even if the findings were inadequate, this issue is not properly before the Court because appellant did not seek reconsideration of the Commission's Order on this ground before the Commission itself.

In this reply brief we shall consider first the "job rights" issue, second the "labor policy" question, and finally the argument with respect to the adequacy of the Commission's findings.

ARGUMENT

I. THE JOB RIGHTS ISSUE

A summary of the Commission and Intervenors' argument as to the job rights issue may be fairly stated as follows: The fact that decisions of the Interstate Commerce Commission and the Civil Aeronautics Board have frequently imposed labor protective conditions to the approval of the transfer of common carrier operating rights is irrelevant in a case involving assignment of a broadcast license because broadcasters are not common carriers and are not to be dealt with as such. In any event, appellant's pleadings do not show that economic injury to its members will adversely affect "the operation of WBFM or the public interest" (Com. Br. p. 9) and absent such a showing, the Commission properly refused to resolve conflicting private interests.

The trouble with this argument is that it erroneously assumes that the term "public interest, convenience and necessity" mysteriously acquires a different meaning in the context of common carrier operating rights than it has in the context of assignment of radio licenses. This

assumption is palpably incorrect. The Radio Act of 1927, 44 Stat. 1162 (1927), brought into the field of radio broadcasting a new concept which was taken from the law of public utilities. It provided that to secure a license from the Federal Radio Commission to operate a broadcast station an applicant had to show that "public interest convenience and necessity" would be served thereby. This phrase had also been used in the Transportation Act of 1920, 41 Stat. 481 (1920), 17 U.S.C.A. #5(2) (1928) and it still serves as the basis of the powers of the Interstate Commerce Commission to regulate the acquisition by one carrier of the operating rights and facilities of another.*/

On the other hand, the introduction into the statute of a specific provision to the effect that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier," did not occur until enactment of the Communications Act of 1934, 48 Stat. 1064 (1934), 47 U.S.C.A. 153(h). The purpose of adding this disclaimer to the regulatory statute had nothing to do with the concept of public interest, convenience and necessity and it was not intended in any way to alter or change the meaning of the public interest standard. Under other provisions of the Radio Act of 1927 the question had arisen as to whether Congress had impressed upon the broadcasting business common carrier characteristics. If this question had been answered affirmatively, the jurisdiction of the Interstate Commerce Commission would have extended to broadcast stations in the regulation of their rates for available facilities and other operations. When the Communications Act of 1934 put Section 153(h) into the regulatory scheme the purpose was to remove jurisdictional ambiguities

*/ For an account of how the phrase "public convenience, interest or necessity" became part of the Radio Act of 1927, see Dill, Radio Law (1938) 89.

and to distinguish between common carrier for hire transmission of energy and radio broadcasting for free to the public, financially supported by selected advertisers. Indeed, the 1934 Act retained and reinforced the qualified public utility characteristics of radio broadcasting by maintaining and reenacting the standard of public interest, convenience and necessity.

We submit, therefore, that the arguments of both the Commission and the Intervenors miss the point. The public interest concept has nothing to do with the common carrier concept. Any regulated industry is subject to the public interest test regardless of whether it involves common carriers, and simply because it is an industry affected with a public interest. Broadcasters do not own the air waves -- the public does; entry into the field is controlled by the Commission; licenses to use the public's air waves are renewable, not permanent; the business practices of licensees are, in the public interest, subject to continuing regulatory review. The semantic distinction between a common carrier and a licensee of the air waves does not invest public interest, convenience and necessity with a wholly different meaning in one context than it has in another.

The real point is that the public interest standard, in any regulatory statute, is not the public welfare generally, but the public welfare in relation to the ultimate objectives of the regulatory statute. Thus in United States v. Lowden, 308 U.S. 225 (1939) the Supreme Court said the central question was whether as a matter of law the imposition of labor protective conditions would have any influence or effect upon the maintenance of an adequate and efficient transportation system. But in answering this question the Court broke down the statutory generality

into these "public interest" particulars:

> "....we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not tend to promote the efficiency of service which common experience teaches is advanced by just and reasonable treatment of those who serve." (Emphasis supplied)

In one sense it may be said that the primary objective of the Communications Act of 1934, as amended, is to administer the broadcasting facilities of the nation in such a manner that the maximum advantages thereof are received by the listening public. But this generality is an oversimplification of the public interest standard in a Federal Communications Commission case just as the promotion of an "efficient transportation system" is an oversimplification in an Interstate Commerce Commission context. We must inquire further and ask, as in Lowden, whether it is in the public interest in obtaining maximum advantages from broadcasting facilities to refuse to impose labor protective conditions which may tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances. Or, is it in the public interest in obtaining the maximum advantages from the public's broadcasting facilities to refuse to impose labor protective conditions for the "just and reasonable treatment of those who serve" when "common experience teaches" that such just and reasonable treatment does promote more efficient service?

The direct answer to these questions, whether in an Interstate Commerce Commission, Civil Aeronautics Board or Federal Communications Commission context, is that the deliberate extinguishment of job rights in a regulated industry must be a negative factor in any objective application

of the public interest standard. This negative factor may be balanced or overcome by positive factors justifying the transfer of a station license, but the Commission has cited none.

Appellee and intervenors also argue that Federal Communications Commission v. Sanders Brothers, 309 U.S. 470 (1940) supports the Commission's conclusion that "the issue of the claim of continuing job rights by the six technical employees of WBFM, even after a station sale, is not a matter within the Commission's jurisdiction." We do not so construe the Supreme Court's decision in Sanders. On the contrary Sanders, in our view, strongly supports the entitlement of appellant here to an evidentiary hearing, which it has never had.

In Sanders an existing licensee opposed the grant of another license to a competitor applicant, claiming economic injury. It also applied for a permit to move its location across the Mississippi River from East Dubuque, Illinois, to Dubuque, Iowa, the site of the competing application. A consolidated hearing was held before an examiner on both applications. The Commission granted both applications, reciting that "public interest, convenience and necessity would be served" by such action. On appeal to the Court of Appeals for the District of Columbia, the Court remanded to the Commission to make appropriate findings of fact on the economic issue, holding that "economic injury to an existing station through the establishment of an additional station. . . . is sufficient to furnish proper grounds of contest on appeal."

The Commission thereupon applied for a writ of certiorari. The sole question presented on certiorari was whether "the licensee of an existing broadcast station who will suffer serious and irreparable economic injury as the result of the construction and operation of a new station in

the same community is a 'person aggrieved or whose interests are adversely affected' within the meaning of Section 402(b)(2) of the Communications Act of 1934." Obviously if the existing licensee were not aggrieved, then the Commission was not obligated to make findings on the issue of economic injury.

The Supreme Court, through Mr. Justice Roberts, held that "resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest or necessity, an element the petitioner must weigh and as to which it must make findings in passing on an application for a broadcasting license." But the Court went on to say that a person likely to be financially injured by the issuance of a license, might be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. Hence:

> "In this view, while the injury to such person would not be the subject of redress, that person might be the instrument, upon an appeal, of redressing an injury to the public service which would otherwise remain without remedy."

The Court then found that:

> "In any event, if the findings were not as detailed upon this subject as might be desirable, the attack upon them is not that the public interest is not sufficiently protected but only that the financial interests of the respondent have not been considered."

In short the Court held that aggrievement is measured in terms of public interest, convenience and necessity, and, accordingly, economic injury which affects the public interest, constitutes an appealable issue.

Thus Sanders stands for the opposite proposition to that for which the Commission cites it. If economic injury is alleged and shown, then the Commission must make findings as to whether the economic injury so affects

the public interest as to require some protection.

In this case the Commission ducks this issue altogether by simply holding that it has no jurisdiction to consider the economic injury which grant of the application is likely to cause to NABET's members. It does so without even holding an evidentiary hearing on the issue of whether the economic injury may affect the public interest -- and, indeed, without a finding that grant of the application will affirmatively be consistent with the public interest.

It should be noted that the Commission itself has held in other cases that economic injury to station personnel was at least a factor to be considered in determining whether grant of an application would be consistent with the public interest. For example, in WINX, Inc., 7 Pike & Fischer R.R. 1051, the Commission considered the effect of the grant on a labor agreement as one factor in its determination of whether the public interest would be served, but concluded after considering this matter together with other factors that the public interest would be served. Similarly in Van Curler Broadcasting Corporation, 3 Pike & Fischer R.R. 1612 (1947), the Commission considered the impact of grant of an application upon the employees but held that this factor was not controlling because other job opportunities were available to the employees.

We submit, in a paraphrase of the words of United States v. Lowden, supra, that the imposition of labor protective conditions which will tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances and which will tend to promote efficiency of service which common experience teaches is advanced by just and reasonable treatment of those who serve, will obviously promote the public interest. Just as, obviously, an applicant who refuses to assume any

obligation toward employees of the seller, should have some obligation to justify his refusal by advancing other factors in the public interest which would overcome this refusal.

II. THE LABOR POLICY ISSUE

Appellee Commission argues that the opinion of the Supreme Court in John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) has no relevance to the issue of whether the assignee here has shown a disposition to ignore national labor policy. It bases this contention on a very narrow interpretation of Wiley as being limited to a situation where the successor employer has no contract with a union. And it urges that the Supreme Court made it clear at 376 U.S. 552, footnote 5, that it was not ruling on a situation where the successor employer already had a collective bargaining agreement with an incumbent union.

We submit this narrow construction of the Wiley decision is not justified. The footnote referred to by appellee reads in full as follows:

> "5 The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633, v. Lion Dry Goods, Inc., 369 U.S. 17, 49 LRRM 2670. There is no problem of conflict with another union, cf. L. B. Spear & Co., 106 NLRB 687, 32 LRRM 1535, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees.
>
> "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that

> within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant."

As we understand the second paragraph of this footnote the Supreme Court was saying that while in the specific case there was no conflict with another union, nevertheless an arbitrator might have to consider whether enforcement of the collective bargaining rights of the seller's employees would unduly disturb labor relations of the buyer's employees. It had little doubt that within the flexible procedures of arbitration an arbitrator "would avoid disturbing labor relations at the Wiley plant."

So in the present case as a practical matter it may have become necessary for WPIX, Inc. to reach some kind of accommodation between the bargaining rights of its incumbent unions and the bargaining rights of the seller's employees under their contract with the seller, and conceivably this effort might have led ultimately either to arbitration or a redetermination of the bargaining unit by the National Labor Relations Board. But WPIX, Inc. here took the position that the only bargaining rights it had to consider were the bargaining rights of its own employees and their unions; it refused even to consider the bargaining rights of the seller's employees and their union. As we stated in our original brief, whether the new owner's television employees are unionized or nonunionized, the industrial community which was a radio station continues intact except under new ownership. Apparently WPIX reserves the right to favor one union at the expense of another by ignoring NABET's contract, refusing to employ its members and extending the job opportunities which the radio operation may bring only to members of its own incumbent unions. We construe Wiley to mean that where two sets of bargaining or employee rights are involved, one for the seller's employees and the other for the buyer's employees,

the successor employer, as a matter of national labor policy, is not at liberty to ignore the contractual rights of the seller's employees.

We note again that substantially the same argument as to the effect of possible conflict with collective bargaining agreements in effect with representatives of the buyer's employees was made and rejected in Kent v. C.A.B., 204 F. 2d 263 (CA 2, 1953). There, as we pointed out at page 16 of our original brief, the Court had no difficulty in upholding labor protective conditions imposed by the Civil Aeronautics Board even though the collective bargaining agreements of the two air carriers involved were in conflict.

III. ADEQUACY OF THE COMMISSION'S FINDINGS

Intervenors WPIX, Inc. and Wrather Corporation both argue that appellant's contention that the Commission should be reversed because it did not make findings on "countervailing considerations" in the public interest which would warrant the grant notwithstanding the adverse effect on Wrather Corporation employees, represents an issue of law upon which the Commission was afforded no opportunity to pass within the meaning of Section 405 of the Act, and, therefore is not now properly before the Court.

Section 405 states in part that the filing of a petition for rehearing shall not be a condition precedent to judicial review except where the party seeking such a review "(2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

The question then, quite simply, is whether the Commission was given an opportunity to pass on appellant's contention that where adverse effect on employees is shown as well as action in contravention of

national labor policy, the Commission must advance countervailing considerations of public interest which outweigh the other factors before it can approve the subject application. The answer to this question is quite readily available from the pleadings filed with the Commission by NABET. In its Petition to Deny, filed February 18, 1964, NABET said:

> "In essence the question is whether a contract which on its face and by admission of the parties causes economic injury to the contractual rights and employment of skilled television personnel is prima facie inconsistent with the public interest unless the parties to the transaction advance some countervailing considerations of the public interest which grant of the application would serve. In short, the destruction of jobs cannot of itself be in the public interest unless some resulting improvement in service to the public flowing from the proposed transaction should outweigh the public interest in the loss of jobs. In the application itself and the accompanying exhibits neither the buyer nor the seller advances any such countervailing considerations for evaluation by the Commission other than the seller's unadorned and casual statement that it desires to sell so that it can concentrate its energies on its other business endeavors." (R. 105)

In the Conclusion to the Petition to Deny NABET asked that the applications be designated for hearing on two issues, one of which was:

> "1. Whether the grant of the subject applications will adversely affect the employees of WBFM, and, if so, whether such adverse effect is outweighed by other factors which will enable WPIX, Inc. to better serve the public interest, ..." (R. 109)

We submit the Commission was afforded a full opportunity to pass on this contention and that its failure to make affirmative findings that grant of the application would serve the public interest was error.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in appellant's original brief, it is submitted that the Memorandum Opinion

and Order of the Commission released July 20, 1964 should be set aside and the matter should be remanded to the Commission with directions to designate the applications for hearing.

Respectfully submitted,

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BRIEF FOR INTERVENOR WPIX, INC.

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November 13, 1964.

STATEMENT OF QUESTIONS PRESENTED

The questions presented, as stipulated by the parties, are correctly stated in the brief of Appellant.

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BRIEF FOR INTERVENOR WPIX, INC.

COUNTERSTATEMENT OF THE CASE

This case arose upon the filing by the Appellant labor union (hereinafter referred to as NABET), of a petition to deny an application seeking consent of the Federal Communications Commission, Appellee, to assignment of the license for FM broadcast station WBFM in New York

City from Intervenor Wrather Corporation to Intervenor WPIX, Inc. As Appellant's brief concedes (App. Br., p. 2), there is no dispute concerning the material facts, which may be briefly summarized as follows.

On January 15, 1964, Intervenors jointly submitted an application to the Commission for approval of the assignment of the license of station WBFM from Wrather Corporation to WPIX, Inc. (R. 1-89). The application showed that Wrather Corporation was desirous of disposing of its ownership interest in the station in order to concentrate its energy on other business endeavors, and noted Wrather's belief that the proposed assignee, WPIX, Inc., "based upon its past broadcast experience, is well qualified to operate the station in the public interest and in a manner that will serve the needs of the area" (R. 4). The assignee's portion of the application, executed by Intervenor WPIX, Inc., showed that WPIX, Inc., already a licensee of the Commission, was familiar with the need for FM radio service in the New York area as a result of its longtime operation of a television station in that city, and had for many years desired to broadcast information and entertainment through the FM medium. The assignee's portion of the application also contained detailed program and operating plans showing the manner in which WPIX, Inc. proposed to operate the station after the assignment (R. 16-18, 21-29).

The assignment application was supported by a contract, executed on December 5, 1963 by Wrather Corporation and WPIX, Inc., providing for the assignment, upon Commission approval,* of the transmitting equipment and certain other physical assets of the station, as well as short-term commitments for program services and the sale of broadcast time (R. 50-69). This agreement specifically provided that WPIX, Inc. was not obliged under the terms of the sale "to employ or otherwise incur

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* Since broadcast stations are privately owned, Commission approval is not required before a sale of broadcasting equipment. However, since such stations cannot be operated without a license from the Commission, sales agreements are normally conditioned on prior consent by the Commission to the assignment or transfer of the license involved.

liability to any person employed by the Seller, whether in the operation of the station or otherwise" (R. 53).

On January 20, 1964, the regional representative of NABET wrote WPIX, Inc. advising it that there was an outstanding collective bargaining agreement, expiring November 6, 1964, between NABET and Wrather Corporation covering the six technical personnel employed by station WBFM, and asking WPIX, Inc. to "accept the terms and conditions of the existing agreement by becoming a party thereto" (R. 110). WPIX, Inc. replied to this letter on January 31, 1964, as follows:

> "Our projected purchase of WBFM includes only certain assets. Personnel and contracts are not included in the understanding.
>
> "Although we have not made final plans as yet, it is our expectation that we will not have need for additional technical personnel inasmuch as we already have a substantial staff in connection with our television station.
>
> "We may wish to consider the qualifications of some of the present WBFM employees if we find a need when our plans are further along."

Solely on the basis of the foregoing exchange of correspondence, NABET on February 20, 1964 filed with the Commission a petition asking it to deny or designate for hearing the assignment application (R. 99-111). NABET argued that the unwillingness of WPIX, Inc. to assume Wrather Corporation's collective bargaining agreement with NABET raised two issues: first, whether the Commission must consider as an adverse public interest factor, in passing on an application for assignment of a broadcast license, the possibility that existing employees of the station may be replaced by other personnel as a result of the sale: and second, the "larger question . . . of whether the refusal of the Buyer to acknowledge NABET's bargaining rights contravenes national labor policy" (R. 105). Under the first question, NABET argued that the proposed sale of the station threatened its six members with loss of "contractual rights and employment" arising from the existing collective

bargaining agreement (R. 103). On the second question, NABET "relied entirely on the cases cited and the reasoning used by Commissioner Loevinger in his dissent in *Rockford Broadcasters, Inc.*, 1 R.R. 2d 405" (R. 105).

Oppositions to the NABET petition were filed by both Intervenors (R. 112-140). WPIX, Inc. attached to its opposition an affidavit by its Vice President in Charge of Operations containing the following additional explanation for its decision not to assume the NABET-Wrather collective bargaining agreement (R. 136-139):

> ". . . My primary reason for taking this position was that WPIX, Inc. has had a long-standing collective bargaining relationship with Radio & Television Broadcast Engineers' Union, Local 1212, IBEW, AFL-CIO. The contract provides that the union's jurisdiction extends to all employees engaged in 'radio broadcast' operations. While WPIX is a television station and we now have no radio broadcast operation, it is by no means inconceivable that Local 1212 would claim jurisdiction over the WBFM operation under the terms of the existing contract. Moreover, it is my understanding that both IBEW, Local 1212 and NABET are rivals in this field, and needless to say, we would not wish to become involved in a jurisdictional dispute between these two unions. . .
>
> ". . . I point out here that NABET did not ask us to recognize it, but simply inquired whether we would agree to become a party to the existing contract with Muzak, and this I declined to do.
>
> "When WPIX began its television broadcast operation in 1948, NABET was one of the unions contending for the right to represent our technical employees. After hearings before a National Labor Relations Board officer on the question of an appropriate unit, and an ensuing election, the Board certified IBEW Local 1212 as the collective bargaining representative of those employees.
>
> "It goes without saying that WPIX, Inc. bears no hostility toward unions in general, nor toward NABET in particular. At the present time we have collective bargaining agreements with six separate unions representing different classes and groups of our employees.

> ". . . We are unwilling to assume any long-term commitments, whether for time sales, programs or personnel. To do otherwise might possibly prevent us from putting into effect the program policies and commercial practices which we feel would best serve the public interest.
>
> "Finally, I am unable at this point to designate the particular persons who will operate the FM station, as I informed Miss Belack in my reply to her. It may be that we will wish to offer jobs to some of the present WBFM employees if we have such need after considering our existing technical staff. In any case, a prime consideration will be the efficient operation of the FM station with employees interchangeable with the television operation, so that at all times an adequate staff will be available for emergencies in either station."

On March 10, 1964, NABET submitted a reply to the Intervenors' opposition (R. 141-45) and on May 19, 1964, it filed a "supplemental" petition asking the Commission to consider the recent Supreme Court decision in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (March 30, 1964), as enunciating "a new and significant principle in the developing law governing collective bargaining agreements which completely vindicates and supports the views expressed by Commissioner Loevinger in his dissent in the *Rockford* case" (R. 156-59). Intervenors filed oppositions to this "supplemental" petition, pointing out that it was untimely and, in any event, added nothing of substance to the arguments previously advanced by NABET against a grant of the assignment application (R. 160-171).

On July 20, 1964, the Commission released a Memorandum Opinion and Order denying NABET's petition and granted the application for assignment of the WBFM license to WPIX, Inc. (R. 182-86). The Commission held that NABET had standing to object to the proposed assignment as a party in interest. On the merits, the Commission concluded that NABET had "failed to allege any matter demonstrating that a grant of the [assignment] application would not serve the public interest" (R. 185).

The Commission found, first, that the question whether the assignment might result in loss of employment by one or more of the six NABET members currently employed by WBFM was not properly a matter within its public interest jurisdiction but rather involved, at most, private claims which should be brought either before the NLRB or in the civil courts. As to the "larger" question raised by NABET – whether under the circumstances national labor policy was violated by WPIX, Inc.'s unwillingness to assume obligations under a contract with a labor union which is a rival to the union representing WPIX, Inc.'s other technical personnel – the Commission also found against NABET in view of the "uncontroverted representations" before it concerning the "existence of [WPIX, Inc.'s] present collective bargaining agreement and its intentions not to deny union representation to any future employees of WBFM" (R. 186). Although recognizing that the NABET supplemental petition was untimely, the Commission nevertheless also considered the *Wiley* case on its merits and found it inapplicable to NABET's contentions (R. 186). Significantly, Commissioner Loevinger, on whose dissenting opinion in the *Rockford* case NABET had placed its "entire reliance" for the second of the two questions raised in its petition, voted to approve the assignment (R. 182).

Appellant elected not to seek reconsideration of the Commission's Memorandum Opinion and Order pursuant to the provisions of Section 405 of the Communications Act. Instead, it noted a direct appeal to this Court. Since the filing of the appeal, the collective bargaining agreement between NABET and Wrather Corporation has expired.

SUMMARY OF ARGUMENT

1. The Commission correctly held that the Appellant union's allegations of a threat to the job rights of six of its members, in the circumstances here presented, was not a matter relevant to the public interest determination which the Commission was required to make before granting the assignment application. Questions of employee rights under

collective bargaining agreements are for determination by the National Labor Relations Board or other appropriate forums and are not within the jurisdiction of the Communications Commission, whose obligation is to vindicate and enforce public, rather than private, interests. A mere allegation that a proposed station sale may result in personnel turnover, without a showing of some manner in which the employment changes would adversely affect the public, is not a factor relevant to whether the assignment will serve the public interest, convenience and necessity. Contrary to Appellant's assertions on brief, no prior Commission or court decision holds otherwise. Appellant's reliance on the requirement of employee protection guarantees in the common carrier field is misplaced, since the Commission has no corresponding regulatory duties in respect to broadcast stations. Finally, Appellant's attempt to convert its standing to object to the proposed station assignment, freely acknowledged by the Commission, into *prima facie* grounds for an adverse public interest determination, is wholly without merit.

2. The Commission also acted within its authority in concluding that WPIX, Inc.'s unwillingness to become a party to a collective bargaining agreement negotiated by another company with a union which is a rival to the union certified by the NLRB as the appropriate bargaining unit for WPIX, Inc.'s present technical staff did not, in and of itself, either contravene national labor policy or in any other way adversely reflect upon WPIX, Inc.'s previously established qualifications as a Commission licensee. Facts before the Commission, uncontroverted by Appellant, showed that WPIX, Inc. had already negotiated agreements with Appellant's rival union and other labor organizations, was in no sense hostile to labor unions in general or Appellant in particular, and had no intention of depriving any new employees it might hire for the operation of the FM station of their union rights. No provision of law or judicial decision imposed upon WPIX, Inc. the obligation to assume a pre-existing collective bargaining agreement between Appellant and the assignor of the FM station. Its unwillingness to do sc represented a reasonable good faith

judgment, especially in view of its outstanding commitments to other labor organizations. Consequently, there was no basis on which the Commission could have concluded that the conduct of WPIX, Inc. reflected adversely on its qualifications as the prospective new owner of the station.

3. Appellant's supplementary argument that the Commission's order should be set aside because of its failure to make findings on other, unspecified questions is not properly before the Court and is in any event also without merit. To the extent that Appellant complains of alleged technical defects or omissions in the order under review, it gave the Commission no opportunity to pass upon such complaint because it failed to file a motion for reconsideration as required by Section 405 of the Communications Act. Even if Appellant's quarrel with the form of the Commission's order had been properly presented below, however, it would not require reversal. The Commission was obliged by Section 309 of the Act only to issue a "concise statement" of its reasons for denying Appellant's petition. This it clearly did. Moreover, the information before the Commission in the assignment application and the pleadings provided ample basis for an affirmative conclusion that the assignment would be in the public interest.

ARGUMENT

I.

The Commission Correctly Determined that in the Circumstances Here Presented Appellant's Claim of Continuing Job Rights After the Sale of the Station Was Not a Matter Within Its Jurisdiction.

Under Section 309 of the Communications Act, 47 U.S.C. § 309, the Commission is required, before approving the assignment to new owners of a license for a broadcast station, to find that such assignment will be consistent with the public interest, convenience, and necessity. Appellant's first and principal contention is that the Commission is obliged to

consider, as a factor relevant to that public interest determination, the possibility that the assignment may result in the "extinguishment of bargaining rights and jobs" (App. Br., p. 12) held by unionized employees of the station being sold. The Commission held in this case that such a contention, going as it does to the private rights of station personnel under employment contracts negotiated by the station with their union, was not a matter within its jurisdiction in passing on the public interest aspects of the assignment application (R. 185). As we shall show, the foregoing determination by the Commission was clearly correct in the circumstances here presented. Indeed, a contrary holding would have represented not only an assertion of Commission authority in an area where it properly has none, but also a wholly unjustified intrusion into the labor-management relations field, over which Congress has given primary if not exclusive jurisdiction to the Commission's sister agency, the National Labor Relations Board.

At the outset it is appropriate to recall that on many occasions this and other courts have recognized that private economic injury frequently results from approval by the Commission of applications wholly consistent with the public interest standard it is required to enforce. At least since the landmark case of *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940), however, it has been settled that such private injury is not a factor to be taken into account by the Commission in making the public interest determination called for by the statute unless it appears that the private injury may, in turn, result in detriment to the public. Thus, the Supreme Court held in *Sanders* that:

> ". . . economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest or necessity, an element the [Commission] must weigh, and as to which it must make findings, in passing on an application for a broadcasting license." (309 U.S. at p. 473)

Similarly, this Court recently had occasion to observe that "private economic injury is by no means always, or even usually, reflected in public

detriment", and becomes relevant to Commission action only when "on the facts it spells diminution or destruction of service." *Carroll Broadcasting Company v. FCC,* 103 App. D.C. 346, 349, 258 F.2d 440, 443 (1958).

This appeal (the latest in a series of similar actions before the Commission by NABET) presents the question whether an exception should be made to the foregoing established rule in the case of threatened economic injury to unionized employees of broadcast stations which are sold to new owners. In several recent decisions the Commission has held that the possible loss of jobs by such station employees as a result of changes in ownership otherwise found to be in the public interest is not, in and of itself, a factor relevant to the public interest determination it must make in passing on station assignment applications. *Rockford Broadcasters, Inc.,* 1 R.R. 2d 405 (1963); *Transcontinent Television Corporation,* 21 R.R. 945 (1961); *A. A. Schmidt,* 14 R.R. 1156 (1957); *Greater Huntington Radio Corporation,* 14 R.R. 270c (1956). The basis for the Commission's holdings on the question was summarized in the *Transcontinent* case as follows:

> "The question presented by the subject petitions resolves itself into one of a controversy over private rights. Although petitioners have alleged that a grant of the subject application will result in abrogation of its union contract because the assignee has not assumed such contract, these factors, while sufficient under the circumstances to establish petitioners' standing to be heard, fall far short of facts tending to show that a grant of the application would *prima facie* not be in the public interest. . . Furthermore, the Commission is not the appropriate forum for the adjudication of rights in a private controversy. The Commission has neither the authority nor the machinery to adjudicate alleged claims arising out of private contractural agreements between parties. As we have repeatedly stated, the local civil court is the appropriate forum for such matters. . . Moreover, it appears that no claim is made in the petitions that the subject application was not filed in good faith, or that questions are raised with respect

> to the qualifications of the parties. As to the latter point, petitioners do allege generally that 'by the record presented to the Commission [the proposed station assignee] reveals its unfitness to be a trustee of a broadcasting license.' However, not one fact is offered by petitioners as evidence of this charge. . ." (21 R.R. at p. 956)

The foregoing rulings are dispositive of the first issue posed by this appeal. The Federal Communications Act contains no general charter empowering the Commission to oversee the day-to-day management and operating decisions of individual broadcast licensees. Instead, the Commission's jurisdiction in the broadcast field is circumscribed by the "public interest, convenience and necessity" standard. Matters of station personnel and working conditions are nowhere in the Act made the Commission's concern, and broadcast stations are free to employ such persons as they choose, provided only that they discharge their larger obligation to provide service to the public. The Commission has neither the statutory authority nor the administrative procedures to police labor-management relations in the broadcast field, and its refusal to do so, in the case of asserted union claims, is especially appropriate in view of the fact that another agency, the National Labor Relations Board, has been charged by Congress with precisely that duty.*

The highly conjectural, premature, and speculative nature of the allegations by Appellant to the Commission in this case only underscored the correctness of the agency's decision that they presented no impediment to a grant of the assignment application here involved. Appellant alleged that assignment of the license for station WBFM to WPIX, Inc.

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* In the Labor Management Relations Act, 29 U.S.C. 151 et seq., "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." Garner v. Teamsters Union, 346 U.S. 485, 490 (1953).

would threaten the contractual rights of its six member employees at the station under a collective bargaining agreement negotiated by NABET with the prior owner of the station. In response to the union's demand that it "become a party" to the contract even prior to the station assignment, WPIX, Inc. advised Appellant that its plans for staffing the station after the change in ownership had not become final, that its purchase agreement provided for the sale of physical assets and certain contractual rights only (as is customary in such transactions), and that it might well wish to consider the qualifications of some of the station's employees at a later date. Undisputed affidavits before the Commission also established that WPIX, Inc., far from being in any way hostile to labor unions, presently has in effect a collective bargaining agreement with Appellant's rival union, the International Brotherhood of Electrical Workers (IBEW), and that this existing agreement might well have been jeopardized if WPIX, Inc. had attempted to become a party to an agreement executed by another company with NABET.

Thus the facts before the Commission showed clearly that the essential dispute was purely of a private nature relating, ultimately, to which of two rival unions would represent the employees of the station. Moreover, even the *private* injury alleged by Appellant was purely speculative, since it was by no means clear at the time the Commission passed on the assignment application whether Appellant's six member employees would in fact lose their jobs as a result of the station sale and since the contract on which their job rights were predicated was to expire in any event by its own terms on November 6, 1964, only a few days after the assignment was consummated.

Under these circumstances, the Commission could not, even if it had wanted to, have resolved the questions raised by Appellant in a hearing on the assignment application. The NLRB clearly had the primary, if not the exclusive jurisdiction over these questions. 29 U.S.C. §160. As far as the individual job rights of the six member employees were concerned, an action in the civil court was also presumably available to each if he felt that

the change in station ownership worked legally cognizable injury to his employment status.

Most important, however, was the fact that *none* of the allegations of Appellant even remotely suggested that the possible loss of job rights of its six member employees would adversely affect the public served by the station being assigned. Absent such an allegation, the purely private, premature, and speculative grievances advanced in Appellant's petition to the Commission were immaterial to its action on the assignment application.

No authority relied on by Appellant is to the contrary. It is, of course, true that "good faith and fair dealing" * by the Commission's licensees may have a bearing upon the public interest. However, none of petitioner's contentions before the Commission in this case tended to establish, even as a *prima facie* proposition, a lack either of good faith or fair dealing by Intervenor WPIX, Inc. Indeed, the Commission specifically found that the threatened job rights dispute on which Appellant's petition was based was not a matter "reflecting on the character qualifications of the assignee" (R. 186), and the correctness of that finding is beyond dispute. Consequently, the several cases relied on in Appellant's brief (pp. 12-13) ** in which the Commission has held licensee conduct to

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* Granik v. FCC, 98 App. D.C. 247, 249, 234 F.2d 682, 684 (1956), cited in Appellant's brief, pp. 12-13. In the Granik case the court set aside a Commission decision denying, for lack of standing, a protest to a projected station sale by a third party who alleged that he held a valid prior option to purchase the station from the assignor. The Granik holding has no relevance here in view of the facts that in this proceeding Appellant's standing was acknowledged by the Commission and that here there was no assertion of lack of authority on the part of the assignor.

** In Bay Radio, Inc., 14 R.R. 715 (1956), the Commission had before it allegations that a licensee had been guilty of knowing misrepresentations of fact, fraud and breach of trust in soliciting stock subscriptions; and in the early KFKB Broadcasting Association, 60 App. D.C. 79, 47 F.2d 670 (1931) and Trinity Methodist Church, 61 App. D.C. 311, 62 F.2d 850 (1932) cases, the Federal Radio Commission was concerned with patent misuse of licensed facilities to the detriment of the listening public. Reliance on such inapposite decisions by Appellant only serves to emphasize the weakness of its contentions in this appeal.

be inconsistent with good faith and fair dealing have no application here.

Similarly, Appellant's attempt (App. Br., pp. 13-17) to read into the Communications Act a duty on the part of the Commission to attach job tenure conditions to its approval of broadcast assignment applications is wholly without merit. To advance the novel argument that the Commission should require purchasers of broadcast station equipment to guarantee the job rights of the employees of the stations under their former owners, Appellant is forced to rely on a number of decisions by other administrative agencies, including the Interstate Commerce Commission and the Civil Aeronautics Board, in which job protection conditions have been attached to orders approving mergers or transfers *of certificated common carriers*.

The short answer to Appellant's argument in this respect, of course, is that by express provision of the Communications Act, 47 U.S.C. §3(h), "a person engaged in radio broadcasting shall *not* . . . be deemed a common carrier." It is true that in the common carrier field Congress has frequently provided for administrative enforcement of employee job security when carriers are merged. Indeed, such a provision is included in Title 2 of the Communications Act, 47 U.S.C. §222, relating to the common carriers regulated by the FCC. In sharp contrast, however, no such authority is to be found in the sections of the statute dealing with broadcast stations. Moreover, the courts have repeatedly made it clear that broadcast stations are not to be regulated in the same manner as common carriers, and that their owners are free to conduct their businesses as they see fit, subject only to the overall standard of public interest, convenience and necessity. Thus, in *FCC v. Sanders Brothers Radio Station, supra,* the Supreme Court stated:

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not

> common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted." (309 U.S. at 474-475)

Similarly, in *Pulitzer Pub. Co. v. FCC,* 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937), this Court commented on the same question as follows:

> ". . . we have never said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, etc. The use and enjoyment of such facilities the public has a legal right to demand; but its right to the use and enjoyment of the facilities of a privately owned radio station is of a much more limited character. . . . The licensee of a radio station chooses its own advertisers and its own program, and generally speaking the only requirement for the renewal of its license is that it has not failed to function and will not fail to function in the public interest."

The rationale of the foregoing decisions, insofar as pertinent to Appellant's contention that employee job tenure should be enforced by the Commission, is self-evident. Common carriers are typically monopoly enterprises in which uninterrupted service of a high quality to the public is of sufficient concern to justify minute governmental regulation of all details of operation. By contrast, broadcast stations have no monopoly position, and survive or succumb according to the demands of the market place and the skill of their management. In a highly competitive field such as broadcasting – and especially in cities such as New York where the labor force is virtually unlimited and the competing

stations are many—no discernible public benefit would accrue from agency-enforced job tenure guarantees.*

As a final matter, Appellant's argument (App. Br., pp. 17-18) that the selfsame facts which gave it *standing* to object to the assignment application also suffice, in and of themselves, as grounds for a hearing on the *merits* of the application, may be shortly answered. If any concept is firmly established in administrative law it is that, while private economic injury may confer a right on those injured to object to Commission action as "private Attorney Generals",** such injury is not a valid basis for denial of a protested application by the Commission in the absence of an additional showing of how a grant would inure to the disadvantage of the public. In the *Greater Huntington Radio* case, *supra*, which presented facts quite similar to the present controversy, the Commission stated the applicable rule as follows:

> "While the showing as to standing may be based on economic injury, electrical interference or other *private* effects, the showing with respect to the Commission's action complained of must relate to

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* In an attempt to create a Commission policy which does not exist, Appellant also relies (Br., pp. 16-17) on the Commission's early decision in the Seitz case, 7 F.C.C. 315 (1939) and on the fact that the Commission considers staffing proposals in comparative cases. In the Seitz case, however, the Commission approved the transfer of a broadcast station at White Plains, New York, on express findings that the assignment would result in improved service to the public and that the assignee was legally qualified under the Act to engage in the broadcast business. The Commission noted, in passing, that the proposed new owners of the station intended to continue the staff employed by the previous owners. Contrary to Appellant's suggestion, the Commission has never predicated a finding that a station sale would be in the public interest on the mere fact that existing employees of the station involved would not be replaced by new personnel.

Similarly, the Commission's concern with staffing proposals in comparative hearings has been confined solely to the adequacy of proposed staffs (in terms of size, experience, and allocation among various departments) to effectuate the program and operating plans relied on by the applicant. See Birney Imes, Jr., 17 R.R. 419 (1959).

** Frank, C. J., in Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), cited in Appellant's brief (p. 17). See also National Coal Association v. Federal Power Commission, 89 App. D. C. 135, 191 F. 2d 462 (1951); American Communications Association v. United States, 298 F.2d 648 (2d Cir. 1962).

> the public interest. In granting the above-entitled applications, the Commission found that such grants would be in the public interest. We have given careful consideration to the allegations set forth in the petition and we are unable to find any allegations that said grants were improper or would otherwise not be in the public interest. The only allegations advanced for staying the Commission's action are that an NLRB order for reinstatement of the discharged union members 'would be unable to be inforced (sic) if Greater Huntington no longer owned and operated the stations' and that 'the economic welfare and economic rights, as well as the legal rights' of said employees would be 'seriously jeopardized.' As we have indicated above, these considerations were among the factors which entered into our determination of the question of standing to petition for reconsideration. However, they fall far short of facts tending to show that the Commission's grants were improper or otherwise not in the public interest." (14 R.R. at p. 274)

The principle applied in the *Huntington* case is applicable with equal force to the present situation. At least prior to expiration of its contract with the former owners of WBFM, Appellant had standing to bring to the attention of the Commission any facts in its possession which might tend to show that assignment of the license for the station to Intervenor WPIX, Inc. would be contrary to the public interest. Just as clearly, however, the fact that members of Appellant's labor union may have been threatened with possible loss of employment as a result of the sale of the station did not in and of itself constitute a public interest objection to the proposed assignment. Since Appellant failed to advance any other claim in support of its request for a hearing on the assignment application, the Commission was clearly correct in rejecting its petition.

II.

The Commission Was Also Correct in Concluding that WPIX, Inc.'s Actions Were Not Contrary to National Labor Policy and Did Not Reflect Adversely on Its Licensee Qualifications.

The second ground for denial of the WBFM assignment application relied on by Appellant before the Commission was its argument that WPIX, Inc.'s unwillingness to become a party to the NABET-Wrather collective bargaining agreement prior to its expiration on November 6, 1964 demonstrated "a disposition to ignore national labor policy" (App. Br., p. 19) and hence reflected adversely on WPIX, Inc.'s licensee qualifications. On the basis of uncontroverted facts before it showing WPIX, Inc.'s existing agreements with other unions and its recognition of the right of any new employees who might be hired as a result of the station assignment to become members of an appropriate labor union, the Commission resolved this question against Appellant. Here again, its decision was clearly correct in the circumstances of this case.

Appellant now argues that, merely as a result of the purchase by WPIX, Inc. of the physical assets of the FM station operated by Intervenor Wrather, WPIX, Inc. was obliged as a "successor" company to assume the collective bargaining agreement between Wrather and NABET, and places principal reliance for this assertion on the Supreme Court's decision in *Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), handed down months after its petition was first filed with the Commission. Neither the *Wiley* case nor any earlier decision on the point which we have found, however, establishes the proposition urged by Appellant.

Questions of "national labor policy" must, of course, be determined in the first instance by the agency charged by Congress with the exclusive duty of implementing that policy, the National Labor Relations Board. *San Diego Unions v. Garmons,* 359 U.S. 236 (1959). Pertinent Board decisions on the issue of when a successor or transferee of a business is bound by the terms of collective bargaining agreements entered into by

the former owners of the business establish that the mere purchase of physical assets of a company does not normally impose upon the purchaser either the duty to assume its outstanding labor agreements or to bargain collectively with the unions representing its employees. As early as 1947, in the case of *Herman Loewenstein, Inc.*, 75 N.L.R.B. 377 (1947), the Board summarized the applicable rule as follows:

> "While the Board has, on occasion, held that a purchaser is the successor of the seller and bound by the latter's obligations where the record discloses a continuity of interest and operations * * * the Board has also held that the mere purchase of certain physical assets, without the assumption of any obligation with respect to the employees of the seller, does not constitute the purchaser a successor of the seller or render the purchaser liable under any existing agreement between the seller and a labor organization."

Application of the rule of the *Loewenstein* case by the Board has repeatedly been approved on appeal by the Courts. See, e.g., *N.L.R.B. v. Aluminum Tubular Corporation*, 299 F.2d 595 (2d Cir. 1962); *International Association of Machinists v. Shawnee Industries, Inc.*, 224 F. Supp. 347 (W.D. Okla. 1963). Moreover, the decisions have made it clear that the rule is especially applicable in those instances where a company purchasing the assets of another already has its own existing labor agreements with other unions. *N.L.R.B. v. Aluminum Tubular Corporation, supra.*

The foregoing rule is in no wise changed by the recent decision in the *Wiley* case. First of all, as Appellant's own brief shows, the holding in *Wiley* was confined to a situation "where a unionized employer *merges* with a *non-union* employer." (App. Br., p. 20). Here there was no merger, and WPIX, Inc., the assignee, was long ago fully organized by a number of other labor organizations, including Appellant's rival union. Moreover, the *Wiley* case involved the question whether, when a non-union company completely absorbs a unionized company, it is obliged to *arbitrate the grievances* of former employees of the merged company who have

become its own employees. No demand for arbitration was even made by the union here. Finally, the Supreme Court in *Wiley* made it clear that that case did not involve "a problem of conflict with another union" * – a problem which is at the bottom of the dispute in this case.

Nor is the interpretation of the *Wiley* case by the Ninth Circuit in *Wackenhut Corporation v. Plant Guards*, 332 F.2d 954 (9th Cir. 1964), another recent case relied on by Appellant (App. Br., p. 21), at all helpful to its position. In *Wackenhut*, the court held that a duty to recognize an existing labor agreement survived where a corporation purchased the business of a limited partnership and voluntarily accepted as its own virtually the entire staff of the defunct partnership on the same terms and working conditions which had previously been available to them under the labor agreement. The court concluded that in those circumstances the *Wiley* case was controlling in view of the "relevant similarity and continuity of operation across the change in ownership" as evidenced by the "wholesale transfer of . . . employees [from the acquired partnership to the acquiring corporation] apparently without difficulty." (332 F.2d at 958).

Thus, both the *Wiley* and *Wackenhut* decisions are plainly distinguishable from the facts in this case, and a long line of other authorities fully justified WPIX, Inc.'s unwillingness to assume the NABET-Wrather labor contract. Certainly, as a minimum proposition, the Commission was correct in holding that if WPIX, Inc. did in fact have a duty to recognize and assume Appellant's pre-existing contract with Wrather, its failure to do so was a conclusion "reached from a reasonable difference in interpretation and not one reflecting on [its] character qualifications" as a licensee (R. 186).

Except for the inapposite *Wiley* and *Wackenhut* decisions, the only authority relied on by Appellant for its erroneous contention that WPIX, Inc. had a duty to become a party to the NABET-Wrather contract was

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* 376 U.S. at p. 552, footnote 5.

the dissenting opinion of Commissioner Loevinger in *Rockford Broadcasters, Inc.*, 1 R.R. 2d 405 (1963). In *Rockford*, however, where the Commission majority also rejected NABET's arguments, the facts before it presented a far stronger case for approval of the union's petition —as is shown by Commissioner Loevinger's failure to dissent here despite his vigorous disagreement with the Commission's action in *Rockford*.

The difference of opinion between Commissioner Loevinger and the rest of the Commission in the *Rockford* case turned on the question whether the *nonunionized* transferee's refusal in that proceeding to grant prospective recognition to NABET portended "a policy toward station employees contrary to public policy on collective bargaining." (1 R.R. 2d at 413). The Commission held that it did not. Commissioner Loevinger felt otherwise – in large part, apparently, because although there the transferee proposed *to take over the existing staff* of the station being acquired, it admitted an intention to eliminate certain existing employee benefits. Significantly, Commissioner Loevinger's dissent in *Rockford* did not indicate that he would have similar misgivings where the question was not whether *any* union would represent the employees, but merely *which* union would do so—the basic question at issue here.

Aside from the fact that the applicable authorities do not support Appellant's position, it is also apparent that, as a matter of general policy, it would be unfortunate, to say the least, if Appellant's job protection theories were applied to the sale of broadcast stations. It is a matter of common knowledge in the broadcast industry that NABET and IBEW, the union with which WPIX, Inc.'s technical employees are affiliated, are vigorous rivals. Indeed, the record before the Commission in this case showed that IBEW was certified by the NLRB as the appropriate bargaining unit for WPIX, Inc. technical employees engaged in "radio broadcast" operations some 15 years ago, after a hearing and election in which Appellant was also represented and participated (R. 137-38). If

the Commission's approval of the assignment application had been somehow conditioned on WPIX, Inc.'s assumption of the NABET-Wrather labor agreement, and if WPIX, Inc. had been compelled to absorb within its engineering department employees who were members of NABET, internal disagreement between WPIX, Inc.'s present union and the newly arrived rival labor organization would surely have followed, creating a situation which would scarcely have been calculated either to avoid industrial strife, cf. *Wiley & Sons v. Livingston, supra,* at p. 549, or to enable WPIX, Inc. better to discharge its licensee responsibility of serving the public. Far from raising a valid question of "national labor policy", the position of the Appellant union in this case appears to have been designed merely to drive an opening organizational wedge into the long-standing collective bargaining relations between WPIX, Inc. and a rival union.

III.

Appellant's Argument that the Commission Should Be Reversed Because It Did Not Make Findings on "Countervailing Considerations" Is Not Properly Before the Court and Is in Any Event Also Without Merit.

The third and final contention advanced by Appellant is that the Commission's order should be set aside because of its failure to make findings—not on the matters asserted by Appellant as warranting a hearing on the assignment application—but on other, unspecified "countervailing considerations of public interest" (App. Br., p. 24). This argument is not only plainly without merit, but is not even properly before this Court.

Although Appellant is by no means specific on the matter, it now apparently objects because the order here under review did not contain a finding, *in haec verba,* that a grant of the assignment application would serve the public interest, convenience and necessity (App. Br., pp. 24-26).

Such a finding, however, was implicit throughout the Commission's accompanying Memorandum Opinion, since it found without merit, for reasons fully stated in its opinion, Appellant's various contentions. Moreover, if Appellant is quibbling merely with the technical form of the Commission's disposition of its petition, its arguments are not properly before the Court since it elected not to raise them with the Commission in the first instance as required by Section 405 of the Communications Act. It is well established that alleged errors going to the form or content of the Commission's order will not be entertained unless the Appellant has given the agency an opportunity, by way of a motion for reconsideration, to correct the asserted inadequacies in the first place. See, e.g., *Democrat Printing Company v. FCC,* 91 App. D.C. 72, 202 F.2d 298 (1952); *Red River Broadcasting Company v. FCC,* 69 App. D.C. 1, 98 F.2d 282, *cert. den.,* 305 U.S. 625 (1938).

Appellant also argues that the Commission must advance "countervailing considerations of the public interest" (App. Br., p. 25) in order to justify approval without hearing of an assignment application when a *prima facie* showing has been made that the proposed assignee has demonstrated a disposition to ignore national labor policy and that the assignment would adversely affect employees of the station involved. This contention, however, whatever its merit as an abstract proposition, ignores the fact that the Commission here found, and properly so, that the actions of WPIX, Inc. did *not* establish a disposition to ignore national labor policy or reflect on WPIX, Inc.'s established qualifications as a licensee of the Commission. Nor did the Commission find, as implied by Appellant, that the station sale would adversely affect Appellant's six member employees—although even if such a finding had been made it would not have been a valid ground for denying the assignment application, as shown in Part I of this brief, *supra.*

In arguing that the Commission was required to make explicit findings on matters not raised in its petition to deny, Appellant clearly misconceives the requirements of Section 309 of the Communications Act.

Under the statute, the Commission is not obliged to make *any* formal findings or conclusions in granting assignment applications which it determines to be in the public interest unless contentions are advanced, in a petition to deny, that the grant would not serve the public interest. 47 U.S.C. §309(a). In the latter event, the Commission is required only to enter a "concise statement of [its] reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." 47 U.S.C. §309(d)(2). In this case the Commission clearly complied with Section 309(d)(2), since it released a detailed Memorandum Opinion carefully considering and disposing of each of the contentions advanced by Appellant. It was required to do no more.

Moreover, detailed information in the assignment application and pleadings before the Commission at the time of its grant provided entirely adequate support for its ultimate conclusion that the assignment would be consistent with the public interest standard. In addition to information relevant to the specific contentions advanced by Appellant, the assignment application contained a showing, unchallenged by Appellant, that Intervenor WPIX, Inc., the proposed assignee, was fully qualified as a licensee of the Commission, and proposed to operate the station being assigned in a manner responsive to the program needs and interests of the New York area – needs with which WPIX, Inc. is intimately familiar as a result of its longtime operation in that city of a television station. Under these circumstances, the Commission was within its rights in concluding, as it did, "on the basis of the application, the pleadings filed, or other matters which it may officially notice that there [were] no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience and necessity]." 47 U.S.C. §309(d)(2).

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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November 13, 1964

BRIEF FOR INTERVENOR,
WRATHER CORPORATION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,849

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AFL-CIO,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

WRATHER CORPORATION,
WPIX, INC.

Intervenors.

Appeal from a Memorandum Opinion and Order of the Federal Communications Commission

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November 13, 1964

STATEMENT OF QUESTIONS PRESENTED

The questions presented in this case have been agreed upon by counsel of all parties and are correctly stated in the Appellant's brief.

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BRIEF FOR INTERVENOR, WRATHER CORPORATION

STATEMENT OF THE CASE

Intervenor, Wrather Corporation, is in agreement with the counterstatements of the case contained in Appellee's brief and in the brief of WPIX, Inc., Intervenor.

STATUTES INVOLVED

The pertinent statutes involved in the instant appeal are set forth in the Appellant's brief under the heading "Statutes Involved."

SUMMARY OF ARGUMENT

I

The Commission properly held (1) that the issue of continuing job rights of six employees of a station after a sale, subject to Commission approval, was not a matter within its jurisdiction and (2) that on the basis of all the facts presented, there was no violation of national labor policy. The matter raised by Appellant involved solely a controversy of private rights and, consequently, the Federal Communications Commission properly granted Intervenors' application.

II

The real question before the Federal Communications Commission was whether the public interest would be served by the grant of the assignment of the license of FM Broadcast Station WBFM to WPIX, Inc., Intervenor. No claim was made that the grant would adversely affect the listening public and no facts were alleged that could have justified a hearing.

III

John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543, decided

solely that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement. It did not require the Commission to insist, as a condition precedent, that a proposed buyer of a radio station must assume an existing collective bargaining agreement, particularly where the buyer is already unionized with another union.

IV

The Commission, in granting the application, met the requirements of Section 309 of the Communications Act of 1934, as amended. It (1) made the grant (2) denied the Petition and (3) issued a concise statement of its reasons. No more is required. Further, if Appellant felt that the point was important, it should have filed a timely Petition for Reconsideration pursuant to Section 405 of the Communications Act of 1934, as amended. It chose not to do so.

INTERVENOR'S

I

The Commission Properly Granted Intervenor's Application and Properly Denied Appellant's Petition to Deny

This case involves a Petition to Deny, filed by Appellant labor union directed against an application seeking Federal Communications Commission, Appellee, consent to the assignment of license of FM

broadcast station WBFM, New York, New York from Wrather Corporation, Intervenor, to WPIX, Inc., Intervenor. Appellant's Petition to Deny was filed as the result of the unwillingness of WPIX, Inc., to assume Wrather Corporation's collective bargaining agreement (R. 182-86).

The question presented resolves itself into one of a controversy of private rights. Although Appellant alleged below that a grant of the application would result in the termination of its union contract because the assignee (WPIX, Inc., Intervenor) had not assumed such contract, these factors fall short of facts tendering to show that a grant of the application would, prima facie, not be in the public interest. See 47 U.S.C. §309. It is clear that the Commission is not the appropriate forum for the adjudication of the rights of a private controversy. Indeed, the Commission has neither the authority nor the machinery to adjudicate the alleged claims arising out of a private contractual agreement between parties. 1/ See, Regents of Georgia v. Carroll, 338 U.S. 586.

Appellant's objection to the assignment of the license of Station WBFM from Wrather Corporation, Intervenor, to WPIX, Inc., Intervenor, has raised two questions: (1) Whether the assignment, which might result in the loss of one or more of six jobs by Wrather employees

1/ Cf., Transcontinent Television Corporation, 21 Pike & Fischer RR 945, and Greater Huntington Radio Corp., 14 R.R. 270c(1956)

of the station, represented by Appellant under a contract, was in the public interest; [2] (2) whether the refusal of WPIX, Inc., to assume the contract between the Appellant and Wrather's employees contravened national labor policy and was, therefore, prima facie inconsistent with public interest. [3]

The Commission held, in substance, that the issue of the claim of continuing job rights by the six technical employees of the station, after a station sale, was not a matter within its jurisdiction. Insofar as national labor policy is concerned, the Commission held that, on the facts, there was no such violation (R 182-86). The Commission stated further, that, based upon uncontroverted evidence: (1) WPIX was a party to collective bargaining agreements with another union and (2) it did not intend to deny union representation to any future employees of the radio station. Based upon these uncontroverted facts, the Commission could hardly have concluded that the conduct of WPIX, Inc. portended a policy toward its employees contrary to public interest as reflected in National Labor Managements Relations Act (29 U.S.C. §157, et seq.). The Commission could hardly have found, on the basis of the facts before it, in the main uncontroverted, that grant of the assignment application would be contrary to the

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2/ This contract expired on November 6, 1964.

3/ WPIX, Inc., Intervenor, advised the Commission that it intended to continue its collective bargaining relationship with its own certified union which covers the operation of this very station.

public interest.

WPIX, Inc. is presently the licensee of a television station (WPIX-TV) in New York, New York, and, except for the fact that it failed to assume the union contract, no challenge whatsoever was made to its legal, financial, technical or other qualifications to be a licensee of an FM station. If the agency had gone the other way, we respectfully submit it would have been guilty of a clear abuse of discretion. Of necessity, there is some disruption of personnel every time a broadcast station changes hands, particularly where both parties are licensees. Under point one of Appellant's theory of the case, the Commission would be required to set every transfer and assignment application for hearing. The Commission's decision was wholly justified and within the area of allowable discretion.

II

The Commission was Required to Either Grant the Application or Grant the Petition of the Appellant

The Appellant agrees that the Commission was not required to adjudicate the private claims of the six union members (App. Br. p. 11). It argues, however, that the Commission must determine whether the public interest would be served by a transaction which extinguishes the employment rights and opportunities of six technical employees (Ibid.). We respectfully submit that the ultimate issue for the Commission is not as stated by the Appellant. The real question is

whether the public interest would be served by granting the application. The Appellant does not draw into question the qualifications of WPIX, an existing commercial licensee, and does not question the propriety of the program proposal submitted by the applicant as part of its showing in connection with the assignment application. It is content to argue, as it did below, that the assignment application should not be granted because of the private rights of six persons which it equates with the public interest. The Commission was wholly within its power, under the Communications Act, in concluding (a) that the sale was in the public interest and (b) that the assignee had not acted contrary to the public interest in not assuming the contract in question.

Cases dealing with common carrier problems, cited by Appellant in its brief, are not in point. The Communications Act does not give the Commission the supervisory power over the licensee. In short, the broadcaster is not a common carrier. (47 U.S.C. §3(h) and see, Federal Communications Commission v. Sanders Brothers Radio Station 309 U.S. 470, 475). It is true that the qualifications of the licensee must be weighed in determining whether or not to grant a license or a transfer. See, Regents of Georgia v. Carroll, 338 U.S. 586. However, the record does not reflect bad conduct on the part of WPIX, Inc. Appellant alleged no fact which, if taken as true, militated against a grant. Most importantly, Appellant did not allege, in any of its pleadings before the Commission, that grant of the assign-

ment application would in any manner adversely affect the listening public served by the station. No facts were alleged that would have justified either a hearing or a denial of the application.

III

Appellant's Reliance upon the Wiley Case is Misplaced

Appellant argued below that John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543, stands for the proposition that a new owner of a business enterprise is bound by the collective bargaining agreement between the old owner and the union representing the employees, (1) whether or not there is any successor clause in the agreement; (2) whether or not the new owner had agreed to assume the obligations of the agreement; (3) even if the contract of purchase specifically provided the purchaser was not to assume the agreement; and (4) even if the purchaser already has a certified union having jurisdiction over the operation of the purchased business. Appellant cited this case in support of the proposition that absent a commitment by WPIX, Inc., Intervenor, to assume the existing contract with the union, the pending application should have been denied, or, in the alternative, designated for evidentiary hearing. The Wiley case dealt solely with an arbitration problem. The question involved was whether the merger of a unionized corporation into a non-unionized corporation relieved the survivor of the duty to arbitrate assimilated

employees' grievances pursuant to the unionized corporation's pre-merger bargaining contract. Justice Harlan speaking for a unanimous Court, (Justice Goldberg not participating) stated the issue and the holding as follows (84 S. Ct. 909, 913, 914, 915 (1964)):

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision."
>
> * * * * * * * *
>
> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement."
>
> * * * * * * * *
>
> "In addition, we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership."
> [Citing cases].

Again the basic question for the Commission's decision was whether the public interest would be served by the grant of the application. Appellant would have put the question somewhat differently, i.e., whether the proposed buyer had shown a disposition to ignore the National Labor Board policy to encourage collective bargaining. We submit that nothing contained in any of the documents before

the Commission led to the conclusion that the Appellant's question should be answered affirmatively. In any event, Wiley does not hold that where the assignee proposes to acquire a broadcast station, subject to Commission approval, the agency must insist, as a condition precedent, that the assignee agree in advance to assume existing collective bargaining agreements of the assignor. Certainly, Wiley does not require the Commission to take this position where the assignee already has a union contract, albeit with another union. The regional representative of Appellant asked WPIX, Inc. to "accept the terms and conditions of the existing agreement by becoming a party thereto". (R 110). Neither Wiley, nor any other case, required WPIX, Inc. to accept the agreement.

IV

In Granting Intervenor's Application the Commission Complied with the Requirements of Section 309 of the Communications Act of 1934, as amended

The Appellant contends that nowhere in the Commission's Opinion is "the required finding" made that the public interest, convenience and necessity would in effect be served by granting the application. Appellant misconstrues Section 309 of the Communications Act of 1934, as amended (47 U.S.C. §309(d)(2)). It provides, in substance, that if the Commission finds, on the basis of the application and the pleadings, that there are no substantial and material questions of

fact and that a grant of the application would be consistent with the public interest, it shall do three things. It must (1) make the grant, (2) deny the Petition and (3) issue a concise statement of the reasons for denying the Petition, which statement shall dispose of all substantial issues raised by the Petition. These three things were done here. The Commission specifically found that Appellant failed to allege any matter demonstrating that a grant of the application would not serve the public interest.

Further, if the Appellant felt that more was required, it should have filed a Petition for Reconsideration, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405, and asked the Commission to pass upon the point. The Commission was never given an opportunity to consider the contention that it was required to make a specific affirmative finding and, therefore, Appellant is foreclosed from raising the point upon review. Democrat Printing Co. v. Federal Communications Commission 91 U.S. App. D.C. 72, 202 F.2d, 298; Albertson v. Federal Communications Commission, 87 U.S. App. D.C. 39, 182 F. 2d 397. Since the Commission granted the application and denied the Petition; since there was no showing that a grant was contrary to the public interest, we submit that the Argument is little more than an exercise in semantics.

CONCLUSION

For the foregoing reasons, the Order of the Federal Communications Commission complained of should be affirmed.

Respectfully submitted,

WRATHER CORPORATION,
Intervenor

By _____
Thomas H. Wall

By _____
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By _____
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